The Constitution Unit

Whitehall and the Human Rights Act 1998 The First Year

by Jeremy Croft

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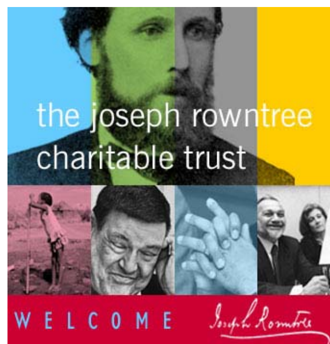

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Whitehall and the Human Rights Act 1998: The First Year

Executive Summary

The first year following the implementation of the Human Rights Act 1998 on 2 October 2000 has gone well for the Government.

The Government has focused mainly on the compliance aspects of the Act. The thorough manner in which it made its preparations and approached the question of risk management has substantially reduced the likelihood of successful challenges on Convention grounds being made in the courts. These have been comparatively few in number and where they have occurred the Government's legal services have been well placed and quick to respond in a usually persuasive manner in the higher courts.

The Government's ECHR litigation strategy, in the first year, reveals a disposition to appeal any successful Convention challenge. It is very unusual for the ruling of a lower court to be accepted. The Government's legal machinery is designed to quickly pick up a case, weigh its significance and expedite an appeal. This would seem to flow from a belief within Government that the audit process conducted prior to 2 October 2000 has eliminated all clear cut breaches of the Convention.

The first year has seen the courts make use of the 'declaration of incompatibility' procedure rarely and the Government respond through a Remedial Order on only one occasion. This is likely to become an established trend. The Government has been more exercised by judges' use of Section 3 of the HRA, to 'read down' legislation. It would prefer stricter bounds on the ability of judges to interpret legislation for consistency with the Convention.

As the existing pre-HRA statute book comes to be validated or changed by internal audit and courtroom challenges, the legal focus will shift from cure to prevention with the main emphasis on ensuring the compatibility with the Convention of new proposed legislation. The new Joint Parliamentary Committee on Human Rights has shown itself to be an effective forum for the consideration of such matters.

The Government faces a major challenge in taking forward its proposed "human rights culture" and in establishing a sense of respect for Convention rights within its departments, public authorities and society as a whole. This was always going to be a long haul. However, progress has been disrupted by the transfer of responsibility for human rights policy from the Home Office to the Lord Chancellor's Department and by the more hostile climate for the protection of individual human rights in the wake of the events of 11 September. Communication on human rights issues within the Government has focused on legal challenges during the first year. Beyond this, the policy of mainstreaming has not cemented human rights as a priority issue within Government departments and public authorities or in their dealings with the public. Possible courses of action are discussed in the body of this report including:

- the need to maintain an active centre of knowledge to champion and act as guardian of the Convention within Government (buttressing the role of the LCD); and
- the inclusion of human rights as one of the performance criteria assessed by public regulatory bodies.

Whether and how matters might be put back on track, particularly for the promotion of human rights, will also come to figure as part of the forthcoming debate on the need for an UK Human Rights Commission. The Scottish Executive has experienced similar and, in some respects, greater problems than Whitehall. It has decided to establish a Scottish Human Rights Commission.

Introduction

The Human Rights Act 1998 is a crucial development in the legal and constitutional history of the United Kingdom. It reaches into and has to be taken into account in every area and activity of government.

This is the second of two reports examining the steps taken by the Government to implement the Human Rights Act 1998. The first report, published in September 2000, documented Whitehall's preparations for the introduction of the Act. It concluded that considerable and well-directed efforts had been made but that a question mark remained over Whitehall's long-term commitment to secure the position of the Human Rights Act and respect for human rights within Government.[1] This report picks up the story with the coming into force of the Act on 2 October 2000. It focuses on:

- the nature of the "human rights culture" being developed and promoted by the Government;
- the Government's human rights policy and machinery steering implementation of the Human Rights Act;
- what has been done (and needs to be done) by Government departments and public bodies to implement the HRA and ECHR;
- the Government's legal machinery and litigation strategy for considering, prioritising and responding to human rights challenges in the courts; and
- the differences and similarities in the experiences of Whitehall and the Scottish Executive in implementing the new human rights legislation.

The first year following the introduction of the Human Rights Act has gone well for the Government. It has mainly focused on the compliance aspects of the Act. The thoroughness of its preparations and risk management approach, in this regard, markedly reduced the prospect of successful human rights challenges being made in the courts. These have been comparatively few in number during the first year and where they have occurred the Government's legal services have been quick to respond in a usually successful manner in the higher courts. The Government has been less active and successful in developing a "human rights culture" and in inculcating a sense of respect for human rights across its departments and public bodies. Whitehall has undergone significant organisational change in its handling of human rights matters and seen a marked falling off in enthusiasm for human rights following the events of 11 September 2001. The structures, systems and procedures remain in place but the sense of purpose is missing. Recommendations on how this might be rekindled are made in this report.

[1] J. Croft—'Whitehall and the Human Rights Act 1998'. The Constitution Unit. 2000.

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The main lines of argument presented in this report were developed through two private seminars in October and November 2001 at which many of those listed above contributed, questioned and helped to refine the views now presented. The manner of their composition in this report and any errors are the author's responsibility.

1. Human Rights Culture

The Government intends that the Human Rights Act should serve as the basis for a new "human rights culture" in the UK. This chapter examines the two elements involved in promoting such a culture:

- human rights becoming part of the process (rules of the game) of government and political life; and
- human rights becoming part of public consciousness.

1.1 What is meant by a 'human rights culture'?

Prior to October 2000, the Government set out to establish a "human rights culture" based on communitarian principles in which the rights of individuals would be balanced by their responsibilities to each other and to society.[2] This new culture is being built exclusively on the HRA and ECHR wherein incorporation of Convention rights into domestic law is achieved in a manner which does not enable them to override the democratic will of Parliament. The Government chose not to espouse a more liberal view of building a "human rights culture" that might exist primarily to empower the individual with rights against executive and legislative overreach. The culture is also shaped by the domestic policy and political considerations that steered the first wave of constitutional reform initiatives as introduced early in the first term of the new Labour Government. It stands as one of a number of initiatives (together with the devolution settlements and the drive to increase the transparency of Government) introduced, at that time, to redefine the manner and attitudes by which the UK is governed.

A key element of the "human rights culture" is that it is not intended to extend beyond the comparatively narrow band of civil and political rights covered by the ECHR. The Government is not persuaded by arguments that a true "human rights culture" should encompass more than a simple adherence to, and compliance with, the precepts of a single regional human rights instrument (the ECHR). Elsewhere, the UK has accepted international obligations on its conduct in respect of a vast array of economic, social and cultural rights, non- discrimination rights and child rights through other regional and international human rights instruments. From a classical human rights perspective, these rights are indivisible and no less important in building a "human rights culture". However, the treaties and agreements in which they are contained carry no force before domestic courts and suggestions that such rights should be recognised within the "culture" are interpreted by the Government as an unwelcome attempt to achieve a form of domestic legal recognition on their behalf. Under many of these international human rights treaties, the Government has accepted obligations to promote the rights they contain within the UK but this will not be

[2] Ibid pp 10-17.

done as part of its "human rights culture". These other instruments do not have the same domestic status as the ECHR. Through the HRA, the ECHR has acquired constitutional status in the UK: the others have not. This tension was evident in the evidence given by the Home Secretary to the Joint Parliamentary Committee on Human Rights in March 2001 where he accepted that "the generation of a culture of rights and responsibilities in the widest sense should certainly take account of the obligations to which we have signed up internationally" but "if you are asking … whether … every single one of the obligations to which we have signed up internationally should be incorporated into our domestic law … the answer is no".[3] A particular concern, at that time, was the new Charter of Fundamental Rights and Freedoms of the European Union where the Government had battled hard to resist moves to give legal effect to an array of rights not found in the ECHR. Instead, in the eyes of the Government, Convention rights appear to remain synonymous with human rights and the "human rights culture" effectively a question of building a 'culture of compliance' with the ECHR. It means that many departments and public officials believe that complying with the requirements of the HRA and ECHR fulfils all the human rights responsibilities of the Government.

1.2 A "human rights culture" within Government

Inculcating a sense of respect for human rights among government officials is vital. Arguably, the greatest value of the Human Rights Act lies in what does not happen—the court challenges which do not occur because human rights considerations are central to the thought processes of those involved in formulating and executing policies and legislation.

Among officials, the Human Rights Act has been described as a 'constitutional giant' capable of shifting the 'tectonic plates' of government. Prior to the Act coming into force, this saw attention focused on compliance issues and the need to remedy potential breaches of the ECHR. However, as the Act becomes fully embedded in the processes of government, this emphasis is expected to change with a greater focus on prevention rather than cure. In March, the Home Office advised the Joint Parliamentary Committee on Human Rights:

> "The Act is intended, over time, to help bring about the development of a culture of rights and responsibilities across the UK. This involves looking beyond questions of technical compliance. The Convention rights need to be seen as a set of broad, basic values which are accessible to and can be shared by all throughout the UK—and which are fully integrated into the democratic policy making process."[4]

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[3] Joint Committee on Human Rights. Minutes of evidence, Para 12. March 14, 2001. The Committee's deliberations are published at [www.parliament.uk/commons/selcom/hrhome.htm].

[4] 'Implementation and early effects of the Human Rights Act 1998'. Home Office Memorandum for the Joint Parliamentary Committee on Human Rights. February 2001. Available on the Joint Committee website.

Addressing a government audience, the Permanent Secretary to the Home Office used his last progress report to stress the importance of the Human Rights Act as:

> "a constitutional measure, legislating for basic values which can be shared by all people throughout the United Kingdom. It offers a framework for policy-making, for the resolution of problems across all branches of government and for improving the quality of public services. From this point of view it is not right to present the Human Rights Act as a matter for legal specialists. The culture of rights and responsibilities needs to be mainstreamed."[5]

Among the ways in which this could be done, he noted requirements for:

- "developed awareness at all levels of the Convention rights <u>and the associated balances and limitations</u>, as an integral part of public administration and policy-making
- frequent practical expression of the positive difference the Convention can and does make, by voluntary good practice as well as by court decision
- clear and public demonstration of commitment to Convention values and principles at the highest levels of government and public authorities
- public recognition of the Convention values and principles in delivering quality public services."[6]

The Human Rights Unit may make practical recommendations but it is not in a position to impose a uniform "human rights culture" in mainstreaming the requirements of the Human Rights Act across Government. Nor will a "human rights culture" be created quickly. The culture is likened to an infant who will need to be nurtured over a number of years. The Unit talks of a 'drip drip' effect in heightening awareness of human rights within departments. However, this also means Government departments have been left largely to their own devices to determine how (or if) they should bring about a "human rights culture". In the run up to the implementation of the Human Rights Act, the handful of departments to address the issue did so through a prism of their existing priorities and policies. Some organisations (notably the police and in local government) combined human rights with 'best value' initiatives on the delivery of services. Others linked human rights to the 'culture of openness' being pursued through the data protection and freedom of information legislation. But even where the issue has been considered, only rarely have efforts been made to establish any form of "human rights culture" throughout the organisation or in any of its related public authorities and other bodies subject to the Act. For most departments, building a "human rights culture" is not a political priority. It is handled in a low-key manner with the knowledge locked in the heads of the handful of departmental officials dealing directly with

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[5] Human Rights Act: Building the Culture of Rights and Responsibilities. Memorandum from the Permanent Secretary to the Home Office. April 9, 2001. Available on the LCD website [www.lcd.gov.uk/hract/hramenu.htm].

[6] Ibid.

implementation of the Human Rights Act. And as these officials have moved on so has the knowledge.

Since the implementation of the Act in October 2000, the building of a "human rights culture" has effectively slipped out of sight within Government. For most departments it has become 'yesterday's issue'. Matters have been further compounded by human rights, having drifted gently off the political radar screen, returning post 11 September to be pilloried as an obstacle to the fight against terrorism. Politically, the latter part of 2001 was not a time for Government to extol or promote the virtues of protecting individual human rights.

The emphasis on mainstreaming the requirements of the Human Rights Act within Government means that the Human Rights Unit has assumed a back seat role in supporting departments' activities concerning a "human rights culture". Nevertheless, through its published guidance and road shows, the Human Rights Unit continues to espouse the merits of a 'human rights culture' and the manner in which it could be achieved. At a conference in December 2001, for a predominately civil service audience, the Head of the Unit listed the key features of the culture as:

- "A new ethical language for policy making and dispute resolution 'An anchor for policy making and a sail for public service delivery'
- Prevention not cure
- Extra help for the 'victims of democracy'
- Judges and politicians working in partnership
- A UK Bill of Rights, with basic values we all can share."[7]

To implement the culture an emphasis is placed on establishing human rights as an issue for all public servants not just lawyers so that:

> "Public authority staff at all levels:
>
> - recognise Convention issues and discuss the values, principles and 'balancing'
> - freely and in non technical language
> - 'walk the talk' in their advice to politicians and in front line services to the public
> - understand the positive difference the HRA makes to quality public services by voluntary good practice as well as court action
> - are fully committed to the inclusive, constitutional vision."[8]

These are sensible measures but this message is not being widely heard in departments and public authorities. For example, only one of the departmental human rights co-ordinators interviewed for this report had a clear conception of the "human rights culture" being put

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[7] Speech delivered by the Head of the Human Rights Unit at the CAPITA Human Rights Act conference, London, 3 December 2001.

[8] Ibid.

forward by the Human Rights Unit and none had received any communication from the Unit in this regard since it became part of LCD in July 2001. Without reinforcement from the centre, in too many departments and public authorities progress has stalled: the phrase "human rights culture" has been imbued with little real meaning and its use invites cynicism or blank looks among officials.

It is difficult to see how a "human rights culture" will be established and maintained throughout Government without the political will to keep the issue alive. The Government is faced with the problem of building a culture out of litigation or the fear of litigation. There is no political kudos in being associated with challenges and breaches under the Convention. This is not a culture to be embraced enthusiastically by Government departments. As matters stand, therefore, building a "human rights culture" within Government exists mainly as a policy on paper but not in practice.

1.3 A 'human right culture' for the UK

The Human Rights Unit has worked to influence public perceptions about the Human Rights Act. Its main aims appear to have been:

- to win public support for the Human Rights Act and to counter criticism that the Act might cause 'damage' to the legal system and traditional values in society; and
- to reduce the expectations of potential users and deter ill-conceived use of the Act.

During the run up to October 2000, the Home Office Human Rights Task Force actively promoted the positive benefits of the Act and tried to correct some of the more outlandish media reports concerning the use to which the Act might be put. These efforts enjoyed some success—aided by the careful manner in which the courts have since used the Act which greatly limited the scope for 'scare stories'.

Ironically, in the latter part of 2001 it was a Government department, the Home Office, which launched the most trenchant attacks on the new human rights regime. Beset by the twin ills of terrorism and mounting asylum claims, the Home Office posited the need to substantially amend or override the Human Rights Act with a stark warning to the courts not to stand in the way of the defence of democracy. More rationally, the measures actually contained in the Anti-terrorism, Crime and Security Act 2001 were set within the framework provided by the HRA and ECHR for dealing with national emergencies. But bitter arguments ensued over the need to derogate from Article 5 of the Convention to give the Government the power to detain indefinitely terrorist suspects that it could not bring to trial or deport as well as the need for a whole raft of other security measures 'hitchhiking' on the theme of combating terrorism. The debate illustrated, notwithstanding passage of the Human Rights Act, the readiness of the Government to set aside human rights considerations for political and public policy reasons. On their first real test, a hole had been punched through the 'floor' of Convention rights.

In any political climate, selling a "human rights culture" to the public is an extraordinarily difficult task. The Human Rights Unit is quick to point out that building a horizontal culture where individuals embrace Convention rights in their business and social relationships is going to be a long-term process. In a rare statement of purpose, Baroness Scotland, junior Minister at the Lord Chancellor's Department described the Government's aim as being: "to build a modern civil society based on the basic values of individual worth and equality of opportunity for all. These values are reflected directly in the ECHR, which through the Human Rights Act, is now in our system of law."[9]

But little is being done, as yet, to lay the foundations for a horizontal (inter-citizen) "human rights culture". The initial publicity campaign organised by the Human Rights Unit and Human Rights Task Force for the launch of the Human Rights Act was short lived although their guidance materials continue to be in demand. Otherwise, for any progress, it is necessary to look to the less direct but laudable efforts being made to invoke human rights in the context of citizenship programmes (which will become part of the national curriculum for schools in England in 2002).

There are clear credibility problems for any Government organisation attempting to sell a "human rights culture" to the public (which task has been made more difficult, for the moment, by the Government's own negative stance over the protection of certain individual human rights since 11 September). In other countries, in other parts of the UK and in related subject areas (racial equality, equal opportunities and disability) dedicated commissions exist which fulfil the promotional and inspirational role. Promoting awareness of human rights will be a function of the proposed Scottish Human Rights Commission. The activities of the Northern Ireland Human Rights Commission also indicate what can be done with such a body in place. The Government may be reluctant to embrace the notion of a fully-fledged Human Rights Commission with the ability to hold the executive to account but it was not slow, in the past, to recognise and utilise the expertise of the non-government members on the Human Rights Task Force to sell the human rights message. Building an effective "human rights culture" for the UK is more likely to prosper in hands which are not be tied by the political concerns and conflicting demands of Government. However, by itself, this is unlikely to provide sufficiently compelling grounds, in the eyes of the Government, for the establishment of an UK Human Rights Commission. Nor would it prompt the appointment of a 'Human Rights Commissioner' mirroring the role of the Data Protection and Information Commissioner.

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[9] 'Citizenship and Justice', speech delivered by Baroness Scotland QC at Liverpool John Moores University, 24 October 2001. Available on the LCD website.

1.4 Conclusions

The Human Rights Act has given human rights teeth and legitimacy but also had the unfortunate consequence of narrowing the focus of the human rights debate in the UK. There is a tendency to assume that the only 'real rights' are those 'constitutional rights' found in the ECHR which can now be enforced in the domestic courts. A senior health official could deny the existence of a 'right to health', for example, because there is no such right included in the Convention. This is symptomatic of a widespread attitude among public servants who have been 'taught' to see the Government's human rights obligations in terms of compliance with the ECHR. This misconception is exacerbated by the espousal of a "human rights culture" that excludes rights not found in the ECHR and which are not justiciable before domestic courts. Any attempt to seek a more broadly based culture is rejected because the Government interprets such moves as an attempt to obtain some form of domestic legal status for these other rights. They are not to bask in the sunlight of the HRA. The Government's does not conceive that there could be a "human rights culture" encompassing both civil and political rights (enforceable in the courts) and economic, social and cultural rights (which are achieved through social programmes). In the Government's eyes, such a culture would advance the possibility of other Protocols in the ECHR, rights contained in UN human rights instruments and, most menacingly, the EU Charter of Fundamental Rights and Freedoms becoming part of domestic law. These are developments not contemplated under present Government human rights policy. Government policy in these areas is, however, due for review following the successful 'bedding down' of the Human Rights Act.

From a wider human rights perspective, promoting compliance with the ECHR is clearly a part of a "human rights culture" for the UK but not the sum total of that culture. In focusing on the Convention, no obvious attempt has been made by the Government to set it in its context as being one of over 10 human rights instruments ratified by the UK. The Government is correct to develop a culture of respect for the rights and responsibilities contained in the ECHR but wrong to dress that up as a "human rights culture" without acknowledgement of the broader context.

In England and Wales, the "human rights culture" (flaws and all) is not now being pursued with vigour across Government and finds little resonance with the general public. The same has been true of Scotland. However, in Scotland, there is a firmer political commitment to the establishment of such a culture and the task will be taken forward by the proposed Scottish Human Rights Commission. Promotion and awareness building of human rights in England and Wales will not prosper while the organisation pursuing such aims is fixated on keeping in bounds the legal remit of such rights. It is a task that might better be performed by a Human Rights Commission or, at the very least, by a forum that may function with greater freedom and flexibility of thought and without the legal cares of a Government department.

2. Implementation of the Human Rights Act

2.1 Purpose

This chapter examines:

- the Government machinery for steering implementation of the Human Rights Act;
- the Government's human rights policy;
- the role of the centre in securing and supporting the implementation of the HRA and ECHR in departments and public bodies; and
- what has been done (and needs to be done) by departments and public bodies to implement the HRA and ECHR.

2.2 A brief overview

The smooth introduction of the Human Rights Act and the small number of human rights cases presenting significant implications has allowed the Act to drift to the political and policy backwaters of Government.

Having successfully steered the preparation process and mainstreaming policy for the Human Rights Act, the Home Office was quick to assume a back seat for its implementation—winding up the Human Rights Task Force in March 2001 and allowing most co-ordination and monitoring tasks to quickly revert to the Cabinet Office. In June, for reasons largely unconnected to human rights, policy responsibility for the subject was transferred to the Lord Chancellor's Department. In July, the LCD also assumed the Cabinet Office's co-ordination responsibilities following the dismantling of the Constitution Secretariat (again for reasons not connected to human rights). Any plans that the LCD might have had in the area of human rights policy were eclipsed by the events of 11 September. Instead, as the year closed, the protection of individual human rights afforded by the HRA and ECHR was more likely to be criticised as an 'obstacle' in the war against terrorism.

2.3 Government machinery and human rights policy

During the preparation phase, it was an indicator of the special status and significance accorded to the ECHR and Human Rights Act within the Government that they were thought sufficiently important to warrant dedicated Cabinet committees[10]. The last meeting of the Ministerial Sub-committee on Incorporation of the European Convention on Human Rights (CRP(EC)), chaired by the Lord Chancellor, was held immediately before the Human Rights Act came into force in October 2000. However, the committee continues to function as a decision making body through the circulation of papers and correspondence concerning

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[10] See J. Croft 'Whitehall and the Human Rights Act 1998'. EHRLR [2001] Issue 4 pp 392-393.

human rights issues. After October 2000, the most important of these paper exercises required all departments to furnish the Cabinet Office with returns on significant human rights challenges ('hot cases') and a consolidated list of these, as approved for issue by the Lord Chancellor, was circulated to committee members.

When the Human Rights Act came into force on 2 October 2000, no one body within the central structure had overriding authority for dealing with the Act. The Home Office held policy responsibility for the HRA and functioned as the lead department except in matters relating to the judiciary which came under the Lord Chancellor's Department. Overlaying these individual responsibilities, the Constitution Secretariat of the Cabinet Office had a broad policy function and role of providing the means through which collective decisions could be made on issues concerning the Act.

Of the three, prime responsibility for the implementation of the Human Rights Act rested with the Human Rights Unit of the Home Office. During the preparation phase, the Home Office's purpose had been to see human rights and the obligations imposed by the HRA mainstreamed into the activities of every department with a minimum of central direction and control. Hence, most of the organisational arrangements put in place to see through the preparations for the Act were of a temporary nature and were not to form part of a permanent structure to oversee and direct matters concerning the operation of the Act.

After October 2000, the Home Office showed no inclination to remain deeply engaged in matters relating to the future operation of the Human Rights Act. Its mainstreaming approach firmly placed the responsibility on individual departments to implement the requirements of the HRA in their policy, decision and law making. The Home Office was quick to distance itself from this process. In December 2000, departments were advised that the Cabinet Office would take over the role of requesting information on the impact of the Act and would act "as a 'ginger group' around Whitehall to ensure that matters of importance across Departments are recognised and dealt with in a suitable manner".[11] The Home Secretary acknowledged that the Home Office retained "over-arching responsibility"[12] for the HRA, but his department's interest extended little beyond the Act's impact upon its own subject areas. It was inevitable that the Home Office's responsibility for the effective implementation of the HRA (even with the best efforts of the Human Rights Unit) should start to count for less than its day to day concerns of managing a portfolio covering areas—law enforcement, immigration, prisons—now subject to challenge under the Act.

During the preparation phase, conscious of the need for consensus and the scale of the task involved, the Home Office had established a Human Rights Task Force, comprising representatives from key government departments and non-government organisations in order to facilitate implementation of the HRA. The Task Force had played an important role

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[11] HRTF Paper (00) 22, para 3(f).

[12] Joint Committee on Human Rights. Minutes of Evidence, 14 March 2001, paras 23-24.

in contributing to the preparation of guidance and publicity materials. It had also acquired and performed a valuable inquisitorial role in examining the effectiveness of the preparations being made in individual departments.

Neither Government nor non-government members of the Task Force had envisaged that it should become a permanent body. The Home Office had always considered that the Task Force should not continue to function for more than a few months after the introduction of the HRA. In October 2000, it proposed that the Task Force should continue to meet until around April 2001 and that in this remaining period it should switch its focus from departmental presentations to maintaining a more general overview of the immediate impact of the HRA.[13] However, at the insistence of non-government members, while the cycle of departmental presentations was ended, two new sub groups were formed (covering legal and home affairs and health, social services and education matters) to address the general level of preparedness in key sectors. In the end, the two sub-groups had little time to make an impact. The Task Force's sense of purpose and momentum was rapidly evaporating. While recognising the Task Force's value, non-government members were frustrated by what they saw as its limited mandate, restricted resources and absence of any meaningful research capacity. From both a Government and non-government perspective, the existence of the Task Force complicated the re-animated debate over the need for a Human Rights Commission. From a non-government perspective there was concern that the existence of the Task Force might make it more difficult to press the case for a Human Rights Commission. Conversely, from a Government perspective there was concern that the Task Force might act as a stepping stone bringing nearer the setting up of just such a commission. Both parties were content, therefore, if for different reasons, when the Task Force ceased to function in March 2001.

The dissolving of the HRTF coincided with the much delayed formation of the Joint Parliamentary Committee on Human Rights with a remit to examine draft legislation and conduct enquiries into general human rights issues in the UK.[14] Continuing disagreements between the Government and opposition parties over the committee's composition and chairmanship had severely delayed its formation notwithstanding a Government pledge to

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[13] HRTF Paper (00) 17. ' Human Rights Act Overview and the Role of the Task Force'.

[14] The Joint Committee's terms of reference are to consider:

"(a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);

(b) proposals for remedial orders, draft remedial orders and remedial orders made under section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and

(c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order 73 (Joint Committee on Statutory Instruments)."

have the committee in place by the time the HRA came into force. The membership of the committee was finally agreed in January 2001 with Jean Corston MP in the chair.

In March, the new committee instituted an inquiry into the initial impact of the HRA and the degree to which the associated human rights culture had been established within and outside Government. The committee's brief initial report (curtailed by the impending general election) did not comment on the extent to which acceptance of human rights has been cemented within Government departments or conveyed by them to the host of public authorities and hybrid bodies bound by the Human Rights Act.

The committee's examination coincided with the Home Office reinforcing the point, in passing on the final recommendations of the Task Force, that implementing the Act meant more than the auditing of legislation and the withstanding of challenges in the courts. It stressed that the HRA was:

> "a constitutional measure, legislating for basic values which can be shared by all people throughout the United Kingdom. It offers a framework for policy-making, for the resolution of problems across all branches of government and for improving the quality of public services. From this point of view it is not right to present the Human Rights Act as a matter for legal specialists. The culture of rights and responsibilities needs to be mainstreamed."[15]

This positive note was to mark the last formal communication, at the senior policy level, on the subject between the centre and departments in 2001.

In the run up to the June general election, the possibility of including human rights policy as one of the functions of a more powerful 'Ministry of Justice' was examined by the Institute for Public Policy Research against a background that the Labour Government was preparing to overhaul the central government machinery if winning re-election. The IPPR proposed the creation of a 'Department of Justice and Equality' which "would have an overtly cross-cutting role, promoting good governance in the public sector—due process, human rights and equalities."[16] By July, responsibility within the Government for human rights policy was focussed solely within the Lord Chancellor's Department, if not in a way foreseen by the IPPR report. First, the LCD was installed as lead department following the transfer of human rights as one of a number of constitutional responsibilities moved from the Home Office. In a second step, the Lord Chancellor's Department next acquired the human rights co-ordination functions hitherto performed by the former Constitution Secretariat in the Cabinet Office. Neither move appeared prompted by human rights considerations, but rather as the fallout from other 'more weighty' debates which prompted a restructuring of the responsibilities for devolution and regional issues within Whitehall. There is nothing to

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[15] Letter from John Warne, Acting Permanent Secretary at the Home Office, to Sir Richard Wilson, Cabinet Secretary, dated 6 April 2001.

[16] IPPR—'Time for a Ministry of Justice? The Future of the Home Office and the Lord Chancellor's Department.' [March 2001].

indicate that this exercise will result in a 'Ministry of Justice' with the means and authority to secure respect for human rights within the Government. To have a lead organisation steering the preparations for the Human Rights Act had been unusual given the federal nature of Whitehall and a reflection of the seriousness with which the Act was viewed within the Government. With no serious alarms over the manner in which the Human Rights Act was functioning during its first months, the need for a 'directing' body to oversee implementation of the Act was a non-starting issue within the Government.

Since acquiring its new responsibilities, the LCD has been slow to disclose how it will pick up the 'human rights' baton. However, information provided to the Joint Committee on Human Rights in January 2002 indicates that a radical shift in policy or approach is not immediately on the cards. The department considers:

> "Ensuring the Human Rights Act is embedded in our law and administration and developing a culture of rights and responsibilities are long-term projects. Our current priorities are to achieve a high level of awareness throughout public authorities of the balance that needs to be struck between rights and responsibilities, and how that balance could be achieved. Public authorities should know about the Human Rights Act, and treat it yet as an instrument for achieving good, open and accountable government, and for measuring and improving their standards of service delivery."[17]

Some specific measures are being proposed to achieve these goals. Guidance for Whitehall departments is being revised to take account of experience gained since the introduction of the HRA (it is proper to note that the guidance prepared by the Home Office before the implementation of the Act has proved to be of lasting value bearing out the great care and effort put into its preparation). The new guidance covering such matters as the making of Section 19 statements and the mechanisms for making Remedial Orders is intended to be available at the end of February 2002. Regular but informal meetings are also being introduced between the LCD and the major human rights NGOs (the first of these meetings will consider the concluding observations of the UN Human Rights Committee following examination of the Government's last periodic report submitted under the ICCPR). The department has taken over the 'hot cases' list from the Cabinet Office changing the focus to identify emerging patterns and themes rather than to 'log' individual cases. The department has also responded to pressure from the Joint Committee on Human Rights agreeing that more information should be given in the explanatory notes for Government Bills on the reasons why they were considered compatible with the ECHR. This requirement took effect for all Bills introduced after 1 January 2002.[18]

[17] Memorandum to the Joint Committee on Human Rights from Michael Wills MP. Para 3. Published on the LCD website on 7 January 2002.

[18] HC 18 December 2001 WA 43 and 15 January 2002 Cols 968 –969.

An announcement is also in the offing that the Government will now review its commitments under the ECHR and other international human rights instruments following the successful bedding down of the Human Rights Act. This will entail examination of whether to accede to a number of additional protocols under the Convention (most importantly, the new Protocol 12 creating a free-standing prohibition on discrimination). The exercise will also involve looking at the arrangements whereby individual complaints may be taken to the treaty monitoring bodies for a number of the UN human rights treaties. It is possible that the Government may be prepared to now test the waters in this regard. These treaties contain a number of rights not found in the ECHR or open to different interpretation by their monitoring bodies. While they are not judicial in nature, decisions of these bodies are potentially influential upon the Government. Acceptance of such requirements and scrutiny will require consultation within the Government and might well entail a further risk assessment exercise on similar lines to that conducted for the ECHR. After a quiet beginning, therefore, the LCD may be entering a more active period and on the way to becoming the Government's 'rights department'.

2.4 11 September

Part of the reason for the LCD's inaction hitherto lies in the events of 11 September. The LCD was left on the sidelines as the Home Office became increasingly outspoken in its criticism of the Human Rights Act and ECHR.

The latter part of 2001 became a difficult time for any Government department to choose to extol or promote the virtues of individual human rights. No official acknowledgement was made, good or bad, concerning the impact of the Human Rights Act in its first year. Instead, the first anniversary coincided with an 'open season' during which a number of grievances and concerns with the human rights legislation (particularly in the areas of asylum and immigration) were able to 'hitchhike' on the theme of combating terrorism. It was the starkest possible evidence concerning the ease with which human rights considerations could be set aside by the Government for political and policy purposes. In this sense, the Human Rights Act failed its first major political test since coming into force.

However, the HRA, if not a roadblock, proved to be a major factor in determining the path and means that the Government would employ in the war against terrorism. Initially, the gravity of the threat prompted calls to amend the HRA and override the ECHR. However, on 12 November, the Home Office introduced the Anti-terrorism, Crime and Security Bill seeking to work within the framework allowed by the ECHR for responding to national emergencies. The Bill was accompanied by an Order paving the way for the Government to derogate from the right to liberty and security of the person under Article 5 of the ECHR. Such a step is permitted under the ECHR where there is an emergency threatening the life of the nation. The Government argued that this situation had arisen in respect of the need to be able to detain terrorist suspects who could not be deported (and against whom there was insufficient evidence for a prosecution in this country).

Passage of the Bill was not smooth. The Joint Parliamentary Committee on Human Rights heard evidence from the Home Secretary and in its first report published on 16 November 2001 questioned the need for the derogation. It also expressed particular concern over extensions to the powers of the police and security services that were unrelated to the fight against terrorism but were included in the Bill. Similar views were expressed by the Home Affairs Select Committee and by human rights NGOs who expressed strong reservations over other contentious measures 'hitchhiking' on the theme of combating terrorism. A mini revolt on the Labour back benches in the Commons became a full blooded war in the Lords where several defeats were inflicted before compromise was reached on the new legislation which came into force in December 2001.

Human rights had become part of 'the rules of the political game' but in such highly charged circumstances there was no question that they might wield a veto on policy formulation. The LCD was later to advise the Joint Committee on Human Rights that "human rights considerations and the litmus test of the Human Rights Act have helped achieve a measured and proportionate response to the threat of terrorism in this country".[19] It would be interesting to hear the Home Office's version.

2.5 Implementing the Human Rights Act in departments and public authorities

At the outset it is necessary to admit to a knowledge gap in attempting to understand the 'across the board' impact of the HRA on the work of Government. While it is a manageable task to identify and examine the work of those organisations at the centre that have a role in steering implementation of the HRA, it is a much more daunting task to ascertain what is actually happening/ not happening on the ground. It is also the case that the further an interviewer steps from the centre the less likely that person is to find willing interviewees in a position to talk about the HRA (something of a telling fact in itself).

Since the disbanding of the Human Rights Task Force (and apart from the one exercise generated by the Joint Committee on Human Rights[20]) there has been no systematic monitoring, within or outside Government, of how departments are setting about implementing the HRA.

2.6 The centre's expectations of departments and public authorities

A steady stream of Home Office guidance during the preparation phase backed up by a diligent monitoring system made it clear to departments that they should exercise ownership over the HRA and mainstream its requirements throughout their organisation. They were expected to:

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[19] Memorandum to the Joint Committee on Human Rights from Michael Wills MP. Published on the LCD website on 7 January 2002.

[20] The committee has indicated that it will seek a further update on progress in 2002.

- introduce, disseminate and observe the new human rights culture throughout their organisation;
- review their policies, procedures and legislation for compliance with the ECHR;
- ensure that public authorities and other bodies likely to be subject to the HRA were aware of its requirements and made similar preparations; and
- report back to the centre on their state of readiness particularly in regard to removing potential breaches of Convention rights.

2.7 Maintaining a centre of knowledge

Following the disbanding of the Human Rights Task Force, however, few visible efforts have been made to monitor progress or to maintain communication between the centre and departments on matters of human rights policy or practice. This reflects, in part, the fact that no 'crisis' has arisen during the HRA's first year requiring further policy guidance from the centre, but also that there are no other policy initiatives planned to follow the Act which need to be communicated to departments. Instead, the Home Office was quick to end the system of periodic progress reports required during the preparation phase. It did not have the intention and hence the means to offer permanent support to departments regarding human rights matters. This situation has not obviously changed with the transfer of responsibility for human rights from the Home Office to the Lord Chancellor's Department. The LCD has still to demonstrate a clear sense of purpose in this area.

There appears to be a reluctance at the centre to having any long-term involvement in the implementation of the HRA and ECHR across Government. There are a number of possible reasons. Human rights are not now marked out for special treatment as a political priority of the Government. There is no political kudos to be gained for any Minister by being associated with breaches of Convention rights. Indeed, since the events of 11 September, there is a sense of ambivalence within Government over the need for effective human rights protection. On a more practical level, it has also to be recognised that under the federal Whitehall system, no one Minister or organisation at the centre would have/ seek/ be accepted as having the authority to direct the human rights efforts of other departments. And no central unit (of whatever size) would have the means (knowledge and resources) to provide effective support to every department. Last, and not least important, it is increasingly possible to sense a belief among Government officials that the introduction of the HRA has been sufficient of a success that there is not much more for the centre to do.

By contrast, it is evident that great pains are still being taken by the Government, through its legal networks, to maintain a system for two-way communication regarding court cases under the HRA and ECHR. This includes the identification of significant cases, the analysis of their implications and consequent explanation across the breadth of Government[21]. A

[21] See Chapter 3 below

much higher premium is clearly set on dealing with the direct legal consequences (compliance aspects) of the HRA and ECHR than on their use as a means of delivering a human rights policy in Government. This is not to say that litigation and policy function in watertight compartments with no interaction between the two—this has become more likely, in fact, with the clustering of responsibilities and functions within LCD. The structural means are there to achieve further progress.

2.8 What have departments and public authorities achieved?

The lack of active political championing of human rights at the centre has meant that departments have been left very much to their own devices in implementing the HRA. By October 2000, all departments had reviewed their policies, procedures and legislation for compliance with the Convention. The majority had taken steps to mainstream awareness of the requirements of the HRA and ECHR within their own organisational structure. Most had alerted public bodies within their work areas to the coming into force of the new rights regime. A handful had taken meaningful steps to assist their public bodies to prepare.

Since October 2000, the majority of departments have handled fewer cases citing HRA and ECHR arguments than had been anticipated. Few departments have had to make changes (or contemplate making changes) as a result of a court ruling. And in the absence of court challenges, most departments have substantially reduced the time and resources that they are prepared to devote to human rights matters.

2.9 Best and worst practice

A composite picture drawn from a number of departments reveals a number of strengths and weaknesses concerning the manner in which departments have set about implementing the requirements of the HRA and ECHR.

Best practice sees human rights mainstreamed into the work and goals of an organisation. The presence of an identified Minister and officials charged with responsibility for human rights issues and exercising ownership over the subject. An active and knowledgeable human rights co-ordinator maintaining an extensive network of contacts within the organisation sharing information on human rights matters. Business units maintaining communication with public authorities and public bodies on human rights matters. The creation of local networks among departments to share information, best practice and for problem solving purposes. The promotion of a "human rights culture" as an intrinsic part of the organisational culture and its goals. Systems in place to continue to monitor and review compliance with the HRA and ECHR. Systems in place to ensure that human rights considerations are taken fully into account during the formulation of policy and proposals. Arrangements made to assess and audit the effectiveness of the steps taken to implement the requirements of the HRA and ECHR. A proactive approach to the identification and resolution of potential Convention issues which does not shy away from the cross-cutting

implications. And a positive attitude and readiness to communicate with NGOs, individuals and the public on human rights matters.

Worst practice finds organisations that appear to have no person dedicated to work on human rights or human rights co-ordinators who exist in name only because tasked with many other 'more pressing' responsibilities. Organisations that do not take steps to retain or pass on knowledge and expertise in human rights matters when transferring staff. Organisations that have only a marginal understanding of their responsibilities under the HRA and ECHR (and no systems or mechanisms in place for their realisation). Organisations developing 'local' interpretations of Convention related matters which depart from both the central guidance and generally accepted wisdom on human rights matters. Organisations that are passive and simply react to events on human rights issues. Organisations that maintain no communication with others on human rights matters and pay little regard to any potential cross-cutting implications. Organisations where there is no communication on human rights matters between business units and their public bodies. Organisations that can be characterised by their defensive or negative approach to human rights matters in their public dealings.

Departments with the greatest exposure to Convention points being argued in the courts, unsurprisingly, remain the most focused on human rights matters. The Immigration and Nationality Directorate of the Home Office, which has one of the highest 'Convention' caseloads, established a dedicated Human Rights Management Unit in October 2001, to centralise advice on human rights matters for IND units.[22] This was in addition to an existing

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[22] According to the Home Office, the Human Rights Management Unit's purpose:

"is to ensure that all applications under the Human Rights Act are dealt with swiftly, effectively and accurately; that any blockages in Human Rights workflow are identified and resolved as quickly as

possible; and to ensure that trends in human rights applications are recorded analysed and addressed. The objectives of the unit are therefore:

- – To provide accurate and pertinent monthly Human Rights Management Information & Statistics reports.
- – To compile reports on any barriers in human rights decision making and analyse the root causes.
- – To drive improvements in business process to ensure a fast and efficient system.
- – To track and monitor the progress of human rights applications at all stages of the process.
- – To undertake a continual assessment of the impact of human rights on the business as a whole.
- – To forecast trends in human rights applications.
- – To monitor and assure quality of decision making on human rights cases.
- – To provide, monitor and assure the quality of human rights advice to all areas of the business.

ECHR monitoring group for sharing information within the Directorate. Awareness, although not necessarily an enthusiasm for human rights, is firmly established across the Home Office and a permanent feature of policy and decision making. Other departments or parts thereof have become sensitised to human rights matters by single high profile challenges in the courts (for example, challenges on planning and mental health—see sections 3.4 and 3.5 below). But for the majority of departments, HRA challenges have only had a marginal impact on their work. Even so, some continue to maintain sophisticated structures and mechanisms to oversee human issues. The Department of Work and Pensions maintains a 'risk register' numbering over 200 items of which, admittedly, barely a dozen are now considered to be active. It is also one of the few departments to use a template (with tasks signed off by the policy manager and a lawyer) to ensure that policies, analysis and legal advice reflect Convention issues. Other organisations have dismantled or allowed the systems put in place during the preparation phase to fall into disuse—the most prominent example being the Police.

2.10 Auditing compliance with the Human Rights Act

One of the concluding recommendations of the Human Rights Task Force was that Inspectorates and Audit bodies should include the fulfilment of human rights obligations as one of their areas of scrutiny. This stemmed from the discovery that the Department of Work and Pensions (as the DSS) had, uniquely, used its internal auditors to assess the effectiveness of the steps it had taken to implement the HRA. The auditors' report had been positive.

Independently, District Audit, with a client base in health and local government, had piloted work in the summer of 2000 to ascertain what steps were taken by organisations working in these areas to reduce the risk of legal challenges arising from the HRA. The results were variable:

> "Feedback from pilots for local government showed considerable variation in the way local authorities prepared for the Act. A number had not carried out a review of their policies and procedures for compliance with the Act. In general the health pilots were less well prepared with piecemeal arrangements being made."[23]

The methods used to deliver these goals are:

1. The creation of a team to collate, monitor and analyse the data received, and act as a central point of information for all operational areas of the business, providing advice, information and assistance to colleagues on Human Rights issues as required.
2. The establishment of a system which draws from the databases of both the Integrated Casework Directorate, the Immigration Service Ports and Enforcement Sections to provide accurate statistics in relation to human rights applications, decisions and appeals.
3. The development of a liaison role between all Groups and Directorates within the Immigration & Nationality Department and other Departments with HR interests."

[23] District Audit 'Human Rights Management Arrangements Diagnostic'. Para 1.11.

This convinced District Audit that it should develop comprehensive audit arrangements with the objective of assessing whether the bodies it audits have:

- "effective management arrangements in place for complying with the Act
- identified their key risk areas, which could be subject to challenge under the Act and, as such, have introduced changes to minimise legal, financial and reputational risks
- taken steps to build a rights based culture
- established management arrangements to ensure its contractors/partners are compliant with the Act
- on-going monitoring and review arrangements."[24]

These audit arrangements are likely to take effect in 2002. It will be interesting to see what impact they have in instilling awareness and compliance with the requirements of the HRA within local government and the health sector.

2.11 Is the true impact of the HRA and ECHR within Government 'invisible'?

An argument can be made that the true impact of the HRA and ECHR should not be judged through what happens in the courts. The greatest impact of the new legislation may indeed lie in the court cases that do not happen because policies, procedures and legislation have been vetted and framed with Convention rights in mind. It is very difficult to judge how deeply respect for human rights has been instilled into the working ethos of Government. Embracing the HRA and ECHR should not have required a seismic shift in attitude—'Strasbourg proofing' and notions of fair and accountable government would already make human rights part of the 'rules of the game'. Procedural compliance is also not in question most notably in respect of the making of Section 19 statements for new legislation. There is no question that this procedure is making those involved in policy and law making think about the ECHR as part of their work. In the longer term, this is perhaps the most important requirement of the Human Rights Act especially once the pre-HRA statute book has been tested and amended through internal audit and the courts. What cannot be as easily divined, however, is at what stage and in what manner human rights considerations figure in the policy formulation and legislative process. Is it that they are:

- so deeply embedded in the thought processes of policy makers as to have become second nature;
- a box to be ticked and signed off at the appropriate time;
- an obstacle to be circumvented or overcome; or even
- a combination of all three?

It is not easy to find the information to answer this question. The centre has stopped asking about implementation and appears distant from what is happening within departments.

[24] Ibid. Para 1.9.

And not all human rights co-ordinators have a firm grasp of how such matters are being tackled within their own departments or, another step on, between individual business units and public authorities.

It is an open question, therefore, how human rights considerations are regarded across Government but it is plausible to assume that there is wide variation in practice between departments and within departments. It is clear that there is no 'common standard' concerning how human rights issues should be addressed in policy formulation. Under the Section 19 procedure, the Attorney General is the 'external assessor' where new legislation is involved. There is no equivalent mechanism in policy formulation and no check on a Minister who may choose to play 'fast and loose' with the Convention in pursuit of the policy objectives of his department. There is no system of seeking advice or clearance on human rights matters as is in place for other matters such as regulatory policy. If the LCD has reasons, as 'guardian' of the Convention and Human Rights Act, to oppose the policy or plans of another department it can only do so in an ad hoc manner. A more systematic approach woven into the procedures of Government would clearly have its merits.

One point that stands out is that the fear factor associated with the HRA and ECHR within Government has diminished substantially in the absence of large numbers of successful challenges in the courts. For most departments the HRA and ECHR have presented few problems to date irrespective of how well or poorly prepared they might be. Only where significant issues have arisen, have human rights matters become a priority issue and then only for those directly involved (eg. in asylum, planning and mental health matters). Otherwise, most departments have felt able to substantially scale down their human rights activities and switch attention and training resources to the next initiative in line (normally FOI and Data Protection).

2.12 Putting across the human rights message

The dislocation arising from the transfer of responsibility for human rights from the Home Office to LCD and the backlash over the 'obstacle' posed by the protection of human rights in the fight against terrorism have caused a vacuum at the centre that should be filled if the Government is to seriously address implementation of the HRA in its departments and public bodies. Difficult as it may be in the current climate, there is a need for the Lord Chancellor's Department to actively take on the mantle of human rights guardian and champion and to monitor and more actively support departments in their human rights work. A good start was made during the preparation period but the message has only been partially heard and it needs to continue to be driven home. The mainstreaming approach has fallen short of cementing human rights as a political priority for Government departments and public authorities. Core elements of human rights policy such as the "human rights culture" still have little meaning for many of those working in departments and public bodies. An active 'centre of knowledge' to support and monitor implementation of the HRA and ECHR appears essential.

Whether the Government will do this of its own volition is not clear. If not, the vertical 'top down' structure also functions in response to external pressure and one of the more valuable roles of the Joint Committee on Human Rights, in this regard, is its ability to inquire into the progress being made in implementing the Human Rights Act. For a number of departments, the last occasion on which they have had to consciously think about human rights as a departmental issue, or in communication with the Human Rights Unit, was in response to the Joint Committee's first such inquiry in March 2001. The Joint Committee has indicated that it will continue to enquire into the progress being made within Government.

However, the overall scale of the task of instilling the human rights message across Government and public bodies is potentially too much for one small unit at the centre to fulfil (irrespective of whether it chooses or is 'compelled' to take up the task). It is unrealistic to expect the Human Rights Unit to be able to directly influence what happens in individual business units within departments and there is no realistic prospect of its reach extending into the mass of public authorities (even with its current programme of road shows). A vertical structure whereby the centre informs a human rights co-ordinator in a department who informs business units who in turn inform their public authorities and public bodies has been shown to lose focus well before the last tier is reached. And if the message from the centre loses clarity or is confused by contradictory messages this structure is unworkable.

Perversely, the thoroughness and effectiveness of the preparation process has itself proved to be a hindrance to getting the human rights message across because there has not been a constant stream of court cases in which Government has been found to be in breach of the Convention. The sense of 'urgency' that drove the preparation process has been replaced by a growing sense of 'complacency' now that the sky has not fallen. In such circumstances, it is all too easy for departments to breathe a sigh of relief and move on to the next problem.

In terms of awareness of human rights, the suspicion is that only a few departments are further forward than they were at October 2000 and some may have gone backwards because of the absence of any systematic reinforcement on human rights matters since that date. An often heard comment is that awareness training was completed for all staff before October 2000 but few have subsequently had to deal with human rights issues in an operational role. Since October 2000, human rights training, where it continues to be offered, has tended to become focused on key areas and officials or subsumed into more general training programmes. And unless public bodies have taken it upon themselves to prepare for the HRA and ECHR it is very unlikely that they have been actively prompted or assisted to do so by the relevant business units in their parent departments.

Such comments must be tempered by the fact that the first year of implementation of the HRA has gone well for the Government (especially in the courtroom). It does appear that many areas of Government activity are not going to attract challenges under the HRA and that in other areas, where challenges are made, 'risk management' has largely eliminated the likelihood of serious breaches of the Convention. From a risk avoidance perspective, the

attention paid to human rights will legitimately vary from business unit to business unit/ department to department/ public body to public body. And officials will always respond to the challenge of a court case (albeit that 'fire fighting' is a far less effective use of resources than fire prevention). However, does this mean that human rights values do not in fact need to be inculcated and routinely reinforced in every part of every department and public body? Or is there a point at which human rights no longer warrant being flagged as a distinctive topic and should instead be treated as just another 'ingredient' of Government? If there is, that point does not appear to have been reached with the present level of understanding and respect for human rights within the Government.

Conclusions

A combination of approaches may be required if human rights are to be firmly embedded as part of Government practice and policy. The Government may be relied upon to fulfil the compliance requirements of the HRA and ECHR (albeit as it interprets them). This is the main focus of present human rights activity within the Government and it has been handled in an effective manner. Where compliance issues do not rise to the surface, however, there is less certainty that individual Government departments and public authorities will, of their own volition, actively engage with human rights issues. There is still a need, therefore, for a 'centre of knowledge' to put across the human rights message and for fulfilment of that task to continue to be monitored by an external body such as the Joint Committee on Human Rights. Scrutiny by the Joint Committee matters because it requires a response by the centre and major Government departments and requires thought to be given to human rights matters that might otherwise receive no attention. However, the 'top down' approach also has its limits. To instil the human rights message across the broad swathe of public bodies in the UK would seem to require a more direct injection of knowledge and sense of purpose than is presently trickling down from the centre. The bombshell of a successful challenge will always bring human rights issues into focus in any organisation but such occasions will be rare because of the generally effective manner in which compliance issues have been addressed.

One other avenue that will prompt a response from any organisation is if human rights become one of the performance criteria investigated in the course of inspections or audits by the various regulatory bodies working across the breadth of government. The inclusion of human rights as one of the functions of health and local government bodies to be assessed by the District Audit, for example, is a potentially powerful tool for raising awareness and recognition of human rights within these organisations. And it also almost goes without saying that the existence of a Human Rights Commission probing, questioning and encouraging public bodies, in the same manner as existing commissions dealing with discrimination issues, could have a real impact in driving forward the human rights agenda across the public sector.

3. Legal Services

3.1 Introduction

The Government has expended immense time and effort to try to eliminate the risk of challenge under the Human Rights Act or, where it does occur, to be able to respond in a prompt, effective and convincing manner to whatever Convention issues are raised.

This chapter examines:

- the Government's legal machinery for handling the implementation of the Human Rights Act;
- the Government's 'human rights' litigation strategy for considering, prioritising and responding to human rights challenges in the courts; and
- how the human rights legal machinery and strategy have responded to the first year of challenges under the new legislation as illustrated through actions taken for the first declaration of incompatibility made by the courts, the first remedial order introduced by the Government, and in the course of litigation in the courts.

This chapter is not a definitive guide to the case law arising under the Human Rights Act during its first year. It draws primarily on those cases that have had particular significance for the Government or the way in which its legal services have addressed human rights matters.

3.2 Criminal and Civil co-ordinating groups

The legal arrangements for the HRA have been focused in two lawyers groups set up to look at criminal and civil issues respectively.

Criminal issues

The ECHR Criminal Issues Co-ordinating Group is chaired by a Deputy Legal Secretary in the Legal Secretariat to the Law Officers. Its role is to co-ordinate the handling of ECHR issues that arise in the course of criminal proceedings, and to ensure that any significant developments are made known throughout government.

The Group comprises some 30-35 senior lawyers drawn from some 20 prosecuting bodies as well as policy departments across government. During the preparation phase, the major task taken on by the Group was the review of some 25 critical criminal issues that were identified through the 'traffic light' process as being vulnerable to challenge under the Convention.

This review exercise is said to have revealed only one area where a change in the law was warranted. For the other issues, the Group prepared 'lines to take' with the aim that prosecution lawyers should be equipped to argue these points in whatever court the issue might arise. The lines contained arguments for use in court, reference to relevant case-law and guidance on how to respond should a judge 'read down' sections of the law particularly

as the latter, unlike an intention to make a 'declaration of incompatibility', would not require formal notification to the Crown. In September 2000, the 'lines to take' relating to specific Convention points were published as 'Points for Prosecutors' and posted on the Legal Secretariat to the Law Officers website.[25] Much of the Group's deliberations were also consolidated in the Crown Prosecution Service's internal 'ECHR Guidance' document, completed in December 1999 and distributed to all the CPS areas.

Whether to publish the 'Points for Prosecutors' was a matter of some debate in the run up to October 2000. In the end, arguments that publication would help set the agenda, head off points without merit being raised in court and establish a reference point for judges prevailed over concerns that the 'element of surprise' would be lost and that the lines might not be able to withstand scrutiny from lawyers outside Government. Initial concerns within the Home Office that careful reading of the 'Points' would reveal vulnerable areas were soon set aside with the realisation that the lines were proving an effective tool for convincing judges that the Government knew its business. In other quarters, publication of the 'Points' was generally well-received albeit with some criticism from 'defence' interests about the perceived advantage gained by the 'prosecution' through the placing of such material in the public domain.

The 'Points for Prosecutors' has proven to be a durable document. Expectations that its content would need regular updating and supplementing have not been realised—the only additional supplementary 'line to take' to be prepared and circulated (at the end of 2000) dealt with bail applications. This was not published outside Government. Otherwise, the 'Points' clearly served their purpose of steering Government lawyers and prosecutors through the initial implementation period for the Act when (putting aside hindsight) there was real apprehension over the volume, nature and complexity of the challenges that might be inspired by the HRA and ECHR.

The functions of the Criminal Group began to change after October 2000 as the frequency of meetings increased (to every two months) and it became more involved in operational decisions concerning individual cases. However, its main focus continued to lie in identifying trends and consequences arising from human rights cases. At its meeting in July 2001, for example, the group considered such matters as the use judges were making of Section 3 of the HRA, the implications of the ruling in *R v J* where an Attorney General's Reference had been sought following cases citing unacceptable delay in bringing proceedings in apparent violation of Article 6[26], the implications of *R v Lambert*[27] on reversing the burden of proof and the possible retrospective effect of the HRA, as well as reports from

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[25] Points for Prosecutors [www.open.lslo.gov.uk]. The flowchart (not on the website) guiding prosecutors on how to address Convention issues is reproduced at Annex A.

[26] See section 3.7 below

[27] *R v Lambert,* 5 July 2001, HL. [2001] 3 All ER 577.

the 'coal face' rounding up significant developments and cases in England and Wales, Scotland and Strasbourg. On this occasion, the discussion over the *Lambert* ruling was also to prompt the Group to go on to examine reverse onus provisions across Government.

One crucial lesson learned by Government lawyers during the preparation phase, stemming from the *Kebilene* case[28], was that there was no mechanism by which the Government could expedite the court process, especially appeals, in cases of overriding importance or significance. It was also evident that the Criminal Issues Group itself would not be able to take quick decisions needed on the handling of individual cases. In September 2000, therefore, a new 'fast tracking' sub-group was formed under the Criminal Issues Group.

Until recently the ECHR Fast Track Group met first thing every Wednesday. This has now moved to every alternate week (while the courts are in session). It is headed by a lawyer seconded to the Legal Secretariat from the Treasury Solicitor's Department. This small group, of prosecutors from the CPS, DTI and HM Customs and Excise together with lawyers from the Legal Secretariat to the Law Officers (and an observer from the LCD), is tasked with identifying and collating significant cases and making recommendations on the fast tracking of appeals (see terms of reference at Annex B). Notes of its deliberations are circulated very widely on the same day, including to the Attorney General, Solicitor General, Cabinet Office, Home Office, LCD, Criminal Appeal Office, CPS and Scottish Executive. The notes serve as a 'weekly newsletter' with a constantly updated table of cases recording actions proposed, taken and completed. The group is a lawyers' forum not involving administrators or policy makers. This reflects a belief that policy departments should not be involved in operational decision making about individual cases. However, decisions on the most significant ('headline') cases will be discussed through ad hoc meetings or meetings of the main Criminal Group. The group will consider the question of whether to appeal and the arguments that might be employed in court. The policy background is likely to be taken on board at this time. Recommendations for fast tracking appeals (with reasons) are put by the Fast Track group to the appropriate court authorities who have final say over the listing of cases.[29] The selection of cases is not restricted solely to those where the prosecution wishes to appeal although inevitably there is some bias in this regard. However, decisions to seek the fast tracking of a case are not taken lightly as there is a deep concern that misuse and overuse of the process could alienate court listing officers. In the HRA's first year, the group recommended fast tracking of some 20 cases (see Annex C for the full list).

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[28] *R v DPP ex parte Kebilene* [1999] 3 WLR 972. See J. Croft EHRLR op cit pages 403-405.

[29] A useful description of the work of the ECHR Criminal Issues Co-ordinating Group and its 'fast tracking' group is contained in the Memorandum submitted by the Attorney General to the Joint Parliamentary Committee on Human Rights in March 2001. See 'Minutes of Evidence taken before the Joint Committee on Human Rights, 19 March 2001'. Published on 18 April 2001.

The first of these cases (*R v Havering Magistrates Court*[30]) was brought to the fast tracking group on 4 October (two days after the HRA came into effect). Once the recommendation for fast tracking was accepted, the appeal was heard on 12 December with the decision (favourable to the Government's position) being published on 15 December.

Identifying key cases at an early stage (often referred to as 'capturing' cases by government lawyers) is crucial to the effectiveness of the fast tracking machinery. No attempt is made within government to track every case in which a human rights argument is raised and those involved admit to difficulties in identifying cases in which such arguments are rejected by the courts. A heavy reliance is placed on the Crown Prosecution Service 'antennae' to provide early warning of significant cases and the 'fast tracking group' has a network of contacts reaching into every CPS area. The 'antennae' have been crucial in the identification of themes (eg. delay in bringing a case to trial) where the fast tracking of an appeal has stopped a 'bandwagon' effect developing. Overall, this system is working satisfactorily albeit with some variation in performance between regions. Some of this bears out expectations within the CPS during the preparation phase that its own performance would be 'patchy' with some CPS areas better prepared than others. However, no CPS area is considered to have 'dropped the ball' and most of the variation in use of the HRA and ECHR between regions is attributed more to the varying state of readiness and awareness of local law firms. The CPS's experience so far is that human rights issues are more likely to arise in metropolitan courts. Generally, the experience of the first year of the HRA would suggest that Government lawyers have been much 'quicker to the ball' than lawyers or groups tracking human rights developments outside Government.[31] The prosecutors' tracking system allows important cases to be identified in the courts at first instance and any snapshot of current concerns and preoccupations tends to reveal a host of cases not yet to be found in the law reports. The very first case recommended for fast tracking, for example, related to the reluctance of many magistrates to remand persons for breach of bail conditions without hearing oral evidence (a requirement which had apparently been impressed upon magistrates during their training on the Human Rights Act). This presented severe problems for the CPS. However, the test case (*Havering*) fast tracked and won on appeal in December was not reported in the law columns until February 2001.[32] And then with none of the sense of the concern and substantial time and effort devoted to the issue within the CPS and the

[30] *R v Havering Magistrates Court ex parte DPP, R v Wirral Borough Magistrates Court ex parte McKeown*, 15 December 2000, [2001] 3 All ER 997.

[31] An attempt was made to mirror the fast tracking arrangements within government, through the creation of a similar group outside government which could monitor cases in the criminal courts which might merit fast tracking from a non-government perspective. The group was to be co-ordinated by Liberty with representatives from Justice, the Bar Council and Law Society and an observer from the Lord Chancellor's Department. It has not been active.

[32] R v Havering Magistrates Court op cit.

Fast Track Group (which included the issuing by the Criminal Group of the supplementary, unpublished, 'line to take' on Bail to all lawyers in the CPS).

Civil issues

The organisational stability enjoyed in dealing with criminal human rights issues has not been matched on the civil side. The second co-ordinating group formed during the preparation phase, the ECHR Civil Litigation Co-ordinating Group, was soon bedevilled with problems arising from it dealing with a more diffuse brief and a confusion of functions with a second group—the Joint Ministerial Committee on Human Rights (Official) Legal Sub-group—formed under the Cabinet Office. This confusion was only resolved in July 2001 when the two groups were combined initially under the Cabinet Office and then, following disbandment of the Constitution Secretariat, under the Lord Chancellor's Department.

The ECHR Civil Litigation Co-ordinating Group, chaired by the Head of Litigation in the Treasury Solicitor's Department, had the same functions as its criminal issues counterpart but in relation to civil litigation. It comprised a core of 25-30 senior lawyers with a circulation list of over 80 people for correspondence. There was conscious overlap in membership of the two groups. During the preparation phase, the Civil Litigation Group was the less active of the two meeting infrequently and preferring to rely instead on 'focus groups' to tackle such issues as the implications of the *Kebilene* judgements (concerning the retrospective effect of the Human Rights Act and the extent to which the courts might draw on Convention principles in advance of 2 October). One major task overseen by the Group was the revision of the 'Judge Over Your Shoulder' to highlight the significance and implications of the HRA. The third edition for administrators was published in March 2000.[33]

The Civil Group had a much less smooth ride than its criminal counterpart during the first months' operation of the Human Rights Act. The extent to which human rights issues would be raised in relation to civil matters had been underestimated. In the period to December 2000, for example, eight plaintiffs sought 'declarations of incompatibility' over civil issues compared to none in the criminal field. The Civil Group was not in a position to pick up and co-ordinate action on such cases. It did not have the mechanisms to identify ('capture') cases or the means to take the lead in directing the Government's response particularly as civil cases were much more likely to be swayed by departmental policy objectives.

To improve the effectiveness of the Group, the frequency of meetings was stepped up from every three months to once a month. Considerable efforts were made to improve the capturing mechanisms for cases; to identify key cases and principles; to make the 'read across' between cases; and to determine how critical cases should be handled. A strong emphasis was placed on identifying those cases which required action by the Group rather than just providing an opportunity for airing 'matters of interest'. Following the practice of

[33] Treasury Solicitor—'Judge Over Your Shoulder'. Third Edition March 2000. [www.open.gov.uk/tsd/judge.htm].

the Criminal Group, 'lines to take' were prepared with a particular focus on cross-cutting civil issues (especially relating to Article 6). As befitting the more diffuse subject matter, the lines were less specific than those prepared on criminal matters. They were not published.

Overlapping the work of the Civil Group a second group was formed within the Cabinet Office—the Joint Ministerial Committee on Human Rights (Official) Legal Sub group—in September 2000 with terms of reference "to identify common legal issues arising from the Human Rights Act 1998 and Convention points taken under the devolution legislation, and to discuss legal advice in relation to those issues". Maintaining an interface with the devolved administrations (especially Scotland) had a particular importance during the first months that the Human Rights Act was in place as matters already litigated in Scotland under the devolution legislation began to be tested in courts south of the border. Scotland's 'pioneer' status has gradually diminished, however, as the body of case law builds in the courts of England and Wales.

The legal sub group was primarily envisaged as a policy forum which would pick up issues which were not yet the subject of litigation as well as the consequences of matters that had completed the litigation process where follow up action was required. The group comprised lawyers from all the major departments and met initially at six-week intervals. In the early part of 2001, for example, it met to discuss such diffuse matters as differences in the treatment of same sex partners by the DSS and Inland Revenue, differences in benefits paid to widowers and widows, rulings of the ECtHR on concessionary bus passes, positive obligations under the ECHR (*Osman*[34]), planning practices (*Alconbury*[35]), the definition of criminal and civil penalties (*King v Walden*[36], *Han and Yau*[37]) and enforcement of road traffic legislation (*Brown*[38]). The last issue alone prompted three meetings—on the decision to appeal to the Privy Council, the arguments to be employed before the Privy Council and the compatibility of road traffic legislation generally with the Convention.

Meetings of the legal sub-group soon ceased to follow a fixed timetable being called as and when necessary to discuss specific issues. The need for a dedicated group became less compelling as it became increasingly clear that the courts were not inclined to use human rights considerations to intervene with substantial effect across broad swathes of Government activity. This fact, taken together with the problems still being experienced by

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[34] *Osman v United Kingdom* (2000) EHRR 245.

[35] *R v Secretary of State for the Environment ex parte Holding and Barnes PLC and others,* 9 May 2001, HL. [2001] 2 All ER 929.

[36] *King v Walden*, 18 May 2001, ChD—a decision by the tax commissioners to penalise a defaulting tax payer was a criminal (not civil) charge attracting the additional guarantees for criminal proceedings under Article 6(1) of the ECHR. TLR 12 June 2001.

[37] *Han and Yau v Commissioner for Customs and Excise,* 3may 2001, CA. [2001] 4 All ER 687.

[38] *Margaret Anderson Brown v (1) Procurator Fiscal (Dunfermline) (2) Advocate General for Scotland*, PC 5 December 2001[2001] 2 All ER 97.

the ECHR Civil Litigation Co-ordinating Group in capturing and disseminating information about major civil cases and growing confusion outside the two groups about their respective roles, prompted a review of their functions by the Cabinet Office. It had always been accepted that arrangements for dealing with human rights issues might need to be altered as experience was gained in handling cases. There was no hesitation, therefore, in taking the decision, in July 2001, to combine the two groups into one new group under the Cabinet Office. What was not planned, however, was to see this decision quickly overtaken by other events which dismantled the Constitution Secretariat and saw its human rights functions transferred to the Lord Chancellor's Department.

The new committee in its new home in LCD first met in September 2001. Unusually, it retained two chairmen—the former chairman of the Civil Litigation Group chairing that part of the meeting relating to litigation matters and the former Legal Adviser to the Cabinet Office (now LCD) chairing the part relating to policy matters. The new committee remained a lawyers' forum. The intent was to be better able to capture cases, disseminate information, make the 'read acrosses', deal with cross-cutting issues and, most importantly, 'add value' and thus influence the decision making processes on cases and issues (ie. to be more than a debating and recording forum). Among the policy issues considered at the first meeting were the manner in which judges were applying the interpretation powers in Section 3 of the HRA, the call by the Joint Parliamentary Committee on Human Rights for more information to be provided on the supporting reasoning behind Section 19 statements, progress with the first remedial order being introduced by the Department of Health and the application of Article 6 in the decision-making processes involving Conservation Areas and Sites of Special Scientific Interest.

It is not the intention that the two Co-ordinating Groups should exist on a permanent basis. Resources had been bid for on the basis that they were likely to have an active life span of 2-3 years. At the end of 2001, there were no plans to alter or curtail the functions and activities of the ECHR Criminal Issues Co-ordinating Group or its fast tracking group. These will continue into 2002 although there is an expectation that the workload and the need for such fora should diminish over time. It is too early to foresee the future of the revamped civil arrangements.

3.3 Litigation strategy

The Government has reason to be satisfied with its successful record during the first year of the HRA in defending actions citing possible violations of the ECHR. During the preparation of this report, discussions have been held with Government lawyers involved with the two co-ordinating groups and the fast tracking group to try to establish what factors have guided the Government's litigation strategy (if there is one) in cases where the HRA and ECHR have been invoked. Entering into these discussions, the hypothesis being tested was that the legal machinery seemed set up to operate on the basis that every challenge under the HRA and ECHR should be defended and every successful challenge appealed. This proved to be an

unduly simplistic assessment although there is reason to conclude that the first instinct of the Government's legal machinery is to contest human rights challenges using all possible means of appeal and that the machinery works most effectively when used in this manner. This is not being done blindly, however, and if it is difficult to find occasions where the Government has accepted and acted on rulings of lower courts this possibility is not precluded if justified in the particular circumstances of a case. Albeit, the dice appear loaded against such a possibility.

The successful completion of the 'traffic light' audit prior to October 2000 would seem to mean that in the eyes of the Government all indisputable breaches of the ECHR have been identified and remedied. There are, admittedly, a large number of 'amber' issues that remain on which no action would be taken until challenged in the courts but these are matters where the Government believes it has at least a 'good arguable case' to put forward. It is very difficult, therefore, to envisage circumstances in which the Government would concede a human rights argument before entering the courtroom (unless it was already minded to make changes in that area as a matter of policy). This has only really happened in Scotland with the Convention Rights (Compliance) (Scotland) Act 2001. In London, the Government has come to recognise, however, that some issues 'green-lighted' during the traffic light review and, therefore, not subject to close examination by lawyers may well throw up genuine ECHR issues in the courts.

The successful challenge from 'left field' has been one of the features of the first year's operation of the HRA. One of the first such cases, *Wilson v First County Trust*[39], saw the court itself identify the Convention issue in a dispute involving two private parties before making a 'declaration of incompatibility' in respect of Section 127(3) of the Consumer Credit Act 1974 with Article 1 of Protocol 1 and Article 6 of the Convention (see also Annex D).

If a successful challenge is made to the criminal law, the Government's legal machinery, as described above, is designed to quickly pick up the case, weigh its significance and make recommendations on the timing and content of an appeal by the prosecutor or reference by the Attorney General. For civil matters, these decisions will be made by the department whose policy, practice or legislation has been challenged. In neither case, is there an obvious mechanism whereby the initial court decision might be accepted in consultation with others who are affected by the judgement. Government has a 'deep pocket' and a tendency in its litigation (not just for the HRA) which was described by one Government lawyer as to "take every case as far as it can go; concede nothing". The Government will always contest and appeal cases where an important principle is at stake, legislation is challenged and/or it believes it has a good case. For the ruling of a lower court to be accepted it would need to be a comprehensive and well-argued judgement. But the point is made that even comparatively clear cut judgements might still be appealed to ensure certainty and clarity. As relevant,

[39] *Wilson v First County Trust*, 2 May 2001, CA. [2001] 3 All ER 229.

however, seems to be the practical issue that there is no avenue whereby the Government's legal machinery can readily accept a lower court ruling in consultation with all those who might be affected by the judgement. This is not a function of the fast track group. The Government's legal machinery is geared towards the fast tracking of appeals rather than consideration of the merits of a successful challenge. It would be a bold call indeed on the part of any department or lawyer to accept the ruling of a lower court with implications for other departments and difficult in the extreme to obtain the agreement of all other parties who might be affected within a short timeframe. It is much easier to appeal. It is also a route, judging from the first year of operation of the HRA, which will be likely to obtain a favourable outcome for the Government.

There have only been a handful of cases, therefore, where the Government has not exhausted all the available legal processes before accepting a judgement with implications under the ECHR. They include:

- the declaration of incompatibility made in respect of the Mental Health Act 1983 (see 3.7 below) where the Government had already identified that there was a potential Convention issue which was being addressed in the context of a major review of mental health policy;
- the acceptance in the cases of *King v Walden* and *Han and Yau* that tax and VAT evasion penalties should be treated as criminal and not civil penalties thereby attracting the more rigorous procedural guarantees under Article 6(1) of the ECHR; and
- *R on the application of Nigel Smith v Lincoln Crown Court, R on the application of Chief Constable of Lancashire v Preston Crown Court*[40] where it was accepted that the arrangements for considering licensing appeals by the same magistrates' bench involved in the original decision constituted a clear breach of Article 6. An issue that had been completely overlooked during the audit exercises.

More commonplace, however, is the situation whereby a lower court establishes that there has been a violation of a Convention right only for that decision to be overturned when the Attorney General, or parties, take the case to the Court of Appeal or House of Lords.

3.4 The first 'Declaration of Incompatibility' ("Alconbury")

A major challenge to the planning system came as no surprise to the Government. Even a quick glance at overseas experience indicated that planning matters attracted challenges under human rights legislation. From a private sector perspective, such a challenge represents a reasonable investment/gamble when the rewards of winning more than outweigh the costs involved.

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[40] *R on the application of Nigel Smith v Lincoln Crown Court, R on the application of Chief Constable of Lancashire v Preston Crown Court*, 12 November 2001, QBD,AC.[2001] EWHC Admin 928.

If the private sector had not already been alerted, the list of vulnerable areas (informally referred to as the "Streets of Shame" document) disclosed by the Home Office to the Human Rights Task Force in early 1999 clearly identified planning as one of the areas of concern for DETR. Internally, the planning system's compatibility with Article 6 of the ECHR was judged to be an 'amber' risk for the purposes of the Government's traffic light exercise ie there was considered to be a reasonable chance of challenge which might be successful and should be remedied if possible. This was easier said than done. If the Government could not be wholly confident about the planning system's ability to survive a challenge under the ECHR nor could it be certain what form or degree of change would remove the risk of challenge under the Convention. Politically, it would be difficult if not impossible to persuade Ministers to embark on wholesale changes at considerable cost to ward off such an uncertain threat. Lastly, the government had a legitimate, if not watertight, case to argue and a powerful talisman in *Bryan v UK*[41] which might yet ward off any challenge in the domestic courts. The one major cloud in the sky before 2 October, the decision in *County Properties Ltd v The Scottish Ministers*[42], prompted surprisingly little concern in Whitehall.

The challenge to the planning system when it arose under the Human Rights Act came from an unexpected quarter. In four cases before the Divisional Court[43] the applicants challenged the unrestricted power of the Secretary of State for the Environment under the Town and Country Planning Act 1990 to call in any planning application for determination, when the only opportunity to challenge that decision would be in a subsequent public inquiry. Unusually, even before the cases were heard, DETR had determined that an adverse judgement should be appealed direct to the Appellate Committee of the House of Lords. Use of the 'leap frogging' mechanism would be invoked because it was clear that, given the issues involved, neither party would stop at the Court of Appeal. It was a prescient decision. In December 2000, the Divisional Court issued the first 'declaration of incompatibility' under the Human Rights Act ruling, in effect, that the Secretary of State for the Environment could not be judge in his own cause and stay within the requirements of Article 6 (1) of the ECHR. As summarised for Parliament:

> "The Secretary of State for the Environment, Transport and Regions is not 'an independent and impartial tribunal' for the purposes of Article 6 (1), but is a judge in his own cause as both policy maker and decision taker;

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[41] *Bryan v UK* [1995] 21 EHRR 342.

[42] *County Properties Ltd v The Scottish Ministers* [2000] SLT 965. The Court of Session ruled that the appointment by Scottish Ministers of reporters chairing planning enquiries in Scotland meant that they could not be considered independent and impartial within the meaning of A6(1) of the ECHR.

[43] *R v Secretary of State for the Environment, Transport and Regions ex p. Holding and Barnes Plc, R v Same, ex p. Premier Leisure UK ltd, R v same, ex p. Alconbury Developments Ltd, Secretary of State for the Environment, Transport and the Regions and the Regina v Legal and General Assurance Society Ltd.* 13 December 2000. HL. [2001] 2 All ER 929.

> Judicial Review is not sufficient to remedy the defects in the secretary of State for the Environment, Transport and regions' decision-making role—the scope of judicial review is not sufficiently wide and the court is not prepared to enlarge its power of review."[44]

In a flurry of internal meetings, steps were taken for an appeal to be fast tracked, with the consent of all parties, to the House of Lords. The decision to appeal rested with DETR but reports were made to both the Cabinet Secretary and Prime Minister. As the court had stressed that the Secretary of State had acted in accordance with the law, which remained in force, as provided for under Section 4 (6) of the Human Rights Act, he would continue to exercise his powers under the Town and Country Planning Act. This meant:

> "the existing primary legislation continues to apply and the Secretary of State has a duty to continue determining cases which have been called–in and appeals that have been recovered, and to fulfil his statutory functions in relation to orders made... He will continue to exercise his discretion—for example, as to whether to call-in planning applications—as before. In all cases, he will proceed in accordance with his usual practice. Pending final decisions on the appeals, in deciding whether to call-in or recover cases for his own decision, he will take account of the fact that call-in and recovery, although lawful, have been declared incompatible with the Convention by the Divisional Court."[45]

The appeal was heard by the House of Lords over 26 February to 1 March 2001 with the Lord Advocate also participating because of its potential implications for Scotland.

Pending judgement, some contingency planning was done within Government (informally described as "contingency planning to have a contingency plan") to cover different possible outcomes and impacts on the planning system. However, on May 9, 2001, the House of Lords ruled that the processes by which the Secretary of State made decisions and orders under the Town and Country Planning Act 1990, the Transport and Works Act 1992, the Highways Act 1980 and the Acquisition of Land Act 1981 were not incompatible with Article 6(1) of the ECHR.[46] The Law Lords gave a clear signal that Article 6 was not to become a conduit for judicial intervention in questions of policy. They were uneasy that the Strasbourg court had included public policy making in planning matters within the ambit of "civil rights and obligations" under Article 6. And they were not prepared to substitute the wisdom of judges for what should be a democratic process. It was appropriate, therefore, that the determination of planning policy and its application in particular cases should be in the hands of the Secretary of State who was answerable to Parliament for his policy decisions and to courts as regards the lawfulness and fairness of his decision making. As Lord Nolan remarked:

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[44] HC, 19 December 2000, col 120W.

[45] Ibid.

[46] *R v Secretary of State for the Environment ex p. Holding and Barnes plc and others*

> "To substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not only be a recipe for chaos: it would be profoundly undemocratic."[47]

However, although the declaration of incompatibility was overturned on this occasion, other challenges to the planning system are still expected. Waiting in the wings, for example, was another procedural challenge under Article 6 to the lack of any statutory basis for the inquiry process whereby the Home Office might convert a prison into a detention centre for asylum seekers.[48] Not surprisingly, planning officials and lawyers are to be counted amongst the most sensitised to Convention issues within the Government.

3.5 The first Remedial Order

In March 2001, the Court of Appeal found Sections 72(1) and 73(1) of the Mental Health Act 1983 to be incompatible with Article 5 of the ECHR.[49] This was because of the manner in which the provisions placed the burden of proof on a patient to show that he was no longer suffering from a mental disorder warranting detention in order to be able to satisfy the Mental Health Review Tribunal that he was entitled to discharge. The Court of Appeal ruled that the shifting of the burden of proof to the patient did not allow the legislation to be construed in a manner that would guarantee his right to liberty under Article 5 and a declaration of incompatibility was made. The essential question was the nature of the test to be applied when determining a patient's entitlement for release. Lawyers for the Department of Health conceded that the same approach had to be applied when considering whether to admit a patient and when considering whether the patient's continued detention was lawful. The test was, therefore, whether it could be reliably shown that the patient suffered from a mental disorder sufficiently serious to warrant detention. Because Sections 72(1) and 73(1) of the Mental Health Act did not require the mental health review tribunal to discharge a patient if that could not be shown, they were incompatible with Articles 5.1 and 5.4 of the Convention.

The challenge to Sections 72 and 73 was initially raised as a secondary point to what the Department of Health believed was going to be a different challenge to the Mental Health Review Tribunal constitution. However, by the time that the department was given notice that a declaration of incompatibility was being considered this latter issue had been dropped. The department had considered the risk of challenge to Sections 72 and 73 during its audit of legislation preparing for the introduction of the Human Rights Act. The issue had

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[47] Ibid. Para 60 of judgement.

[48] *S R Foster v Secretary of State for the Environment, Transport and Regions*. [Unreported]. The case concerned the proposed conversion of a prison in the village of Aldington, Kent into a detention centre for asylum seekers.

[49] *R v (1) Mental Health Review Tribunal, North and East London Region (2) Secretary of State for Health, ex parte H* . (4 April 2001) CA. [2001] 3 WLR 512.

been judged to be an 'amber' risk—one where there was a reasonable chance of challenge which might be successful and where action should be taken if possible. In this case, no immediate action was proposed but it was marked down as an issue to be addressed in the proposed rewriting of the Mental Health Act.

The court was asked to approve draft wording for the declaration of incompatibility which had been discussed between the lawyers for both sides. The wording was used without amendment. The order was not made until one week after the judgement and, unlike in the *Alconbury* case, took pains to spell out why the declaration of incompatibility had been made.

A declaration of incompatibility does not alter the law in either the case in which it is raised or other cases. Nonetheless, the implications of the declaration needed to be explained quickly to the chairpersons and members of Mental Health Review Tribunals. This was done the day after the declaration had been made. The guidance made clear that tribunals should continue to function as before. Word spread rapidly within the close knit group of lawyers dealing with mental health issues heading off many questions and further challenges. Internally, the Mental Health Branch informed Ministers and the International and Constitution Branch which had responsibility for co-ordinating human rights matters within the department. The Cabinet Office, Home Office and National Assembly for Wales were notified (Scotland had different legislation) and the subject became a topic of discussion in the various lawyers' networks. Unlike in the *Alconbury* case, a statement by way of a Parliamentary Question was not made because of the timing problems posed by the forthcoming general election.

The decision to rectify the incompatibility by way of a Remedial Order was not automatic or straightforward. All options were put to Ministers in the Department of Health. A decision was made somewhat easier by the fact that the ruling seemed to have direct implications for only one other department—the Home Office's responsibilities for restricted patients.

The ruling on the Mental Health Act came at a time when there was slight but growing unease within Whitehall that the Government's 'winning record' in the courts was undermining the policy and political value of the Human Rights Act. The desire to be seen to be responding positively was tempered, however, by arguments that an appeal could be mounted (as had been done in virtually all other cases of a successful challenge). Also, by questioning that even if the judgement was accepted, did the issue warrant use of the Remedial Order procedure available under Section 10 of the Human Rights Act given the commitments made to Parliament that this path would not be used unless there were 'compelling reasons'[50]

[50] Section 10 of the Human Rights Act 1998. Hansard HC, 21 October 1998 Cols 1330-1331.

Out of this melting pot, the decision not to appeal and to invoke the Remedial Order procedure was taken by health ministers on the basis that only a small shift in policy was required in an area where they were already minded to make changes.

The Remedial Order was presented to Parliament on 19 July using the 'standard' procedure set out in paragraph 2(a) of Schedule 2 of the Human Rights Act (and not the emergency 'fast track' procedure available under paragraph 2(b)). This chosen path required that the document be before Parliament for at least 60 working days during which time representations might be made. Given the nature of the legislative year, under this track it was conceivable that the Order would not be able to take effect until March 2002. This did not really sit well with the purpose of introducing a Remedial Order. However, the standard track was initially chosen by the Department of Health because it was felt that, given the circumstances (no one was being detained unlawfully), it could not be argued that this was an extremely urgent matter warranting curtailing of parliamentary scrutiny. And as this was the first occasion on which the Remedial Order procedure was being used, it was thought desirable to establish a precedent allowing a degree of parliamentary scrutiny.

Within Parliament, the Joint Committee on Human Rights is charged with examining "proposals for remedial orders, draft remedial orders and remedial orders laid under section 10 of and Schedule 2 to the Human Rights Act". Having received the draft Remedial Order it was not completely clear to the Committee how it should proceed. Having considered the issue internally, the Committee put a series of questions to the Department of Health on 1 September (for answer by 15 0ctober 2001) querying such diverse matters as whether the department had been correct to accept the court's ruling (reflecting a belief held by some members of the Committee that the court had, in fact, got it wrong), how many restricted patients were affected by the ruling, would there be a compensation scheme and why was the department using the non-urgent procedure to change the law. Pending the department's reply, the Committee used the first part of the 60 working day period to canvass opinions and seek written evidence from interested groups outside Parliament. This caused some concern to the department as such a step did not appear to be explicitly provided for in Schedule 2 of the HRA. However, the small number of representations received supported the remedial order although it was also pointed out that similar requirements to those made on restricted patients also applied for guardianship under Section 72(4) of the Mental Health Act and provisions concerning release by the Parole Board of discretionary life sentence prisoners under the Crime (Sentences) Act 1997. These other provisions could not be dealt with in the context of the remedial order as they had not been found to be incompatible with the ECHR by a court, but they were flagged in the Committee's report as issues the responsible departments might wish to address[51].

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[51] 'Mental Health Act 1983 (Remedial) Order'. Sixth Report of the Joint Committee on Human Rights, para 17. Published on 19 December 2001.

The DoH responded in detail to the Committee's questions on 15 October. It explained that it had been advised that an appeal would have "no realistic prospect of success. We understand that there was no discernible error of law in the judgement of the Court of Appeal and an application for leave to appeal to the House of Lords had been refused by the Court of Appeal. In addition the judgement was not out of line with the direction of Government policy intentions for new mental health legislation as set out in the White Paper *Reforming the Mental Health Act 1983*"[52]. No other restricted patients were considered to be detained in contravention of the Convention and in the case of 'H' the Mental Health Review Tribunal had made a positive finding in August that there was a mental disorder of a nature and degree warranting detention in hospital. The department did not envisage the need for a statutory compensation scheme: the small number of people likely to be affected by the court's ruling could be catered for through ex gratia payments. It had adopted the non-urgent procedure because no patient was currently affected by the ruling, and it would allow for a higher degree of scrutiny by Parliament.

The Committee responded by pressing further for the implementation of a statutory scheme, which it considered was necessary to fulfil the requirement in Article 5(5) to an enforceable right to compensation for detention in contravention of the Article. It was not able to convince the department on this point. The Committee was more successful on its second issue, however, that the fast track procedure should be adopted as "there should be a presumption that the remedying of any incompatibility which could affect the liberty of the individual should be regarded as an urgent matter."[53] The department switched to the fast track procedure—the Order being laid on 19 November and coming into force on 26 November 2001. In recommending approval of the Order to both Houses of Parliament, however, the committee reiterated its view that that a statutory compensation scheme should have been included within the Remedial Order.

This agreement substantially reduced the risk of the Remedial Order process becoming associated with a procedural morass that would act as a major deterrent to its use on future occasions. Nevertheless, a number of lessons were drawn by the Committee from its experience in handling the first Remedial Order. In its seventh report, published to accompany the Remedial Order, it offered guidance and made recommendations to departments on the practice that might be followed in future for such Orders as well as making recommendations for amendment of the HRA to facilitate the work of the Committee and Parliament. The amendments proposed to the HRA would speed up the process for approval of Remedial Orders under the non-urgent procedure by allowing a

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[52] Letter dated 15 October 2001 from Jacqui Smith MP, Minister of State, Department of Health. Appendices JCHR sixth report.

[53] Letter to the Secretary of State, Department of Health. Appendices JCHR sixth report.

resolution for approval to be moved at any time once the Committee had reported[54]. The guidance for departments recommended timeframes within which departments should notify the Committee of rulings finding violations of Convention rights made by the Strasbourg court, and declarations of incompatibility made by domestic courts, and what action they proposed to take[55]. One consequence of this would be to give the Committee broader insight into the manner in which Government was responding to successful challenges at Strasbourg and in the domestic courts. The Committee also offered criteria to guide departments in their choice of the urgent or non-urgent procedure for which "the decisive factor should be the current and foreseeable impact of the incompatibility on anyone who might be affected by it"[56].

What will Government make of these suggested procedures? It would already appear that the occasions on which a Remedial Order might be employed will be small in number because very few declarations of incompatibility are being made by the courts and on most such occasions departments' first instinct will be to appeal the judgement (with a high probability of success). For any declaration that has broad implications for several departments within the Government, it is also difficult to imagine that a consensus will be reached quickly on the use of such an Order (even within the six-month timeframe suggested by the Committee). The Committee allows for no other path than that the Government will respond to a declaration of incompatibility, whether by way of a Remedial Order or bringing forward amending legislation to correct the incompatibility. The political test will come should the Government choose to stand its ground notwithstanding the making of a declaration of incompatibility. Such circumstances are difficult to envisage. More likely, given the careful manner in which the courts are addressing Convention issues and the problems of coming to a consensus on use of the Remedial Order procedure within Government, is that the Remedial Order is already destined to become a museum piece.

3.6 'Reading down'

Section 3 of the Human Rights Act requires the courts to interpret legislation as far as possible in a way which is compatible with the Convention and only where this is not possible to consider use of a 'declaration of incompatibility'. How judges might apply their power to interpret legislation was a source of unease, during the preparation phase, for those Government lawyers trying to gauge the potential impact of the Human Rights Act. This concern arose out of the fact that whereas the Government could appeal against a 'declaration of incompatibility', there was no obvious avenue whereby this could be done

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[54] See 'Making Remedial Orders'. Seventh report of the Joint Committee on Human Rights. Annex B. published on 19 December 2001.

[55] Ibid. Annex C.

[56] Ibid. Para 36.

should a judge choose to reinterpret or 'read down' legislation to ensure its compatibility with the Convention. Such an interpretation would also have immediate effect unlike a 'declaration of incompatibility'. Before the Act came into force, therefore, the Lord Chancellor spoke of the need for judges not to adopt 'strained interpretations' when considering the compatibility of legislation with the Convention.

Nonetheless, the manner in which judges have applied Section 3 has presented particular challenges for the Government. In a prominent early judgement in the criminal courts (*Offen and others*)[57], the Court of Appeal interpreted (read down) Section 2 of the Crime (Sentences) Act 1997 so as not to be bound by the mandatory sentencing provisions for defendants who had committed two serious offences but, in the opinion of the trial judge, did not pose a significant risk to the public. In a second 'reading down' case (*R v A*)[58], the court reinterpreted Section 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999 (the 'rape shield' law) to remove the blanket bar on a defendant being able to use a defence of consent in sexual offence trials and to present evidence of a prior sexual relationship with the 'victim', and instead left the admission of such evidence to the discretion of the trial judge. This was a difficult judgement for the Government to accept because of its determination to spare rape victims humiliating cross-examination and its wish to boost the level of rape convictions which had fallen to an all time low. It did not welcome the new balance drawn between the rights of the victim and the defendant by the courts but saw no means to challenge the new interpretation. A third 'reading down' case, however, was to prove a step too far for the Government. In *(1) W & B (Children), (2) B (Children)* [59], the Court of Appeal 'read in' new powers of action by the courts under the Children Act 1989 in order to eliminate the potential for breaches of articles 6 and 8 of the ECHR in the course of care proceedings. The powers would give judges greater flexibility in the making of interim care orders and to intervene should important aspects of a care plan not be achieved, for example, because of changes in circumstances. Lady Justice Hale stated:

> "Where elements of the care plan are so fundamental that there is a real risk of a breach of Convention rights if they are not fulfilled, and where there is some reason to fear that they may not be fulfilled, it must be justifiable to read into the Children Act a power in the court to require a report on progress. In effect, such vital areas in the care plan would be 'starred' and the court would require a report, either to the court or to the guardian ad litem … who could then decide whether it was appropriate to return the case to the court … This would only be appropriate if there was good reason to believe that Convention rights had been or were at real risk of being breached.

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[57] *R v Offen; R v McGilliard; R v Mc Keown; R v Okwuegbunam; R v Saunders*, 9 November 2000, CA. [2001] 2 All ER 154.

[58] *R v A*, 17 May 2001, HL. T.L.R. 24 May 2001.

[59] *(1) W & B, (2) B*, 23 May 2001, CA. T.L.R. 7 June 2001.

> There is nothing in the Children Act 1989 to prohibit this. Simply, there is nothing to allow it. The courts have so far been true to the division of responsibility underlying the 1989 Act and declined to introduce it. But when making a care order, the court is being asked to interfere in family life. If it perceives that the consequence of doing so will be to put at risks the Convention rights of either the parents or the child, the court should be able to impose this very limited requirement as a condition of its own interference."[60]

That the courts might 'write in' new powers into existing legislation had considerable implications for the Government and Parliament. It was by no means clear, however, that there was an avenue by which the Government could seek to amend or overturn the interpretation of the court. After much internal debate, the Government determined to appeal on the basis that the Court of Appeal had misdirected itself in its interpretation of the legislation. The appeal was heard by the House of Lords over 12-14 November 2001 (with judgement still pending at the end of January 2002).

A recurring theme in these cases is evidence of a realisation on the part of the judges that where they wish to actually achieve a reinterpretation of the law (particularly to restore judicial discretion or change court practice) 'reading down' is a far more effective tool than resort to a 'declaration of incompatibility'. The court's use of Section 3 of the HRA will remain the most potent means of achieving change and, therefore, a continuing concern to the Government.

3.7 Attorney General's References

Individual cases do not always provide satisfactory answers on Convention issues—the facts of a case may mean that only partial or incomplete consideration has been given to the issue, or an issue may recur in a series of cases none of which offer a conclusive view. Considerable efforts are made by the legal services to ensure the early detection of such trends in the use of the Human Rights Act and, where appropriate, to take pro-active steps to obtain a clear statement of the law. This has brought into renewed prominence the use of the Attorney General Reference procedure as a device to seek clarification of the law.

In *Attorney General's Reference No. 7 of 2000* [61], for example, the Attorney General sought clarification whether the duty owed by a bankrupt under Section 291 of the Insolvency Act to provide documents to the Official Receiver gave rise to a breach of Article 6 of the ECHR if such documents were used by the Crown to prosecute bankruptcy offences. Was this a breach of the right against self-incrimination? In the case in question, the trial judge had ruled that the documents were inadmissible and directed that a verdict of not guilty be entered. The Attorney General referred the following point to the Court of Appeal—did the prosecution of a bankrupt using documents which were delivered up to the Official Receiver

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[60] Ibid, paras 79-80.

[61] *R v Attorney General Reference No. 7 of 2000* CA, 29 March [2001] H.R.L.R. 41.

under compulsion (but did not contain statements made by the bankrupt under compulsion) violate the bankrupt's rights under Article 6 of the Convention? The court, having considered the jurisprudence of the ECtHR, which it did not find wholly consistent, concluded:

> "In our judgement, the answer to the question posed by the Attorney General is 'No'. We say that for a number of reasons. First, there is no doubt and indeed it is not disputed before this court that the privilege against self-incrimination is not absolute and, in English law, Parliament has, for a variety of reasons, in a whole range of different statutory contexts, made inroads upon that privilege."

In a second example, in January 2001, a High Court judge in the north of England stayed indictments against seven defendants on the grounds that there had been an unreasonable delay in bringing the proceedings to trial in breach of Article 6(1) of the Convention. The proceedings related to a prison disturbance. The judge concluded that the time taken between the defendants (inmates of the prison) being interviewed (July 1998) and summonsed (11 February 2000) was a period of unreasonable delay within the meaning of the Convention. The Attorney General sought to clarify the relevant sections of the Criminal Justice Act 1972 (*Attorney General's Reference No. 2 of 2001*). Should criminal proceedings be stayed if the accused could not demonstrate any prejudice arising from the delay? From what point in the criminal process should the time period for calculating 'delay' commence? Judgement delivered by the Court of Appeal (*R v J* [62]) accepted that criminal proceedings should only be stayed where there has been an unreasonable delay that has prejudiced the defence. However, the 'delay' should be calculated not just from the time of being charged but from any point in an investigation where something may have happened to the detriment of the defendant. This latter view posed a particular concern for regulatory bodies conducting criminal investigations. Further clarification is likely to be sought from the courts when a suitable case presents itself.

3.8 Conclusions

There is no question that the first year following the introduction of the Human Rights Act has gone well for the Government. The thoroughness of its preparations before the Act came into force substantially reduced the prospect of successful challenges being made in the courts. Government lawyers accurately foresaw that the courts would not use the HRA to wreak havoc on the existing statute book. Prior to the introduction of the Act, we summarised the Government's expectations as "while there will be jolts to the system, Whitehall is sanguine about its ability to cope with the Human Rights Act"[63]. This confidence has been born out by the events of the first year. And the Government has remained 'on top

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[62] *Attorney General's Reference No. 2 of 2001 under Section 36 of the Criminal Justice Act 1972. R v J*, 2 July 2001, CA.

[63] J. Croft—'Whitehall and the Human Rights Act 1998' [Note 1]. P 7.

of the game' through its developing and maintaining the systems and networks that ensure that prompt attention is given to Convention issues as they emerge in the courts.

As part of this project, Government lawyers dealing with Convention challenges in the two litigators groups were asked to nominate what they saw as the more significant cases since the Human Rights Act came into force. The resulting list (at Annex D) is an eclectic mix of victories for the 'little man', landmark decisions in favour of the Government, rulings that impact directly on the operation of the HRA and matters (such as retrospective effect) which have yet to be fully resolved by the courts. The latter categories tie in closely with the issues that have occupied much of the time and deliberations of the legal networks. However, the first category discloses another desire among Government lawyers and officials: that the HRA should be seen to make a difference, and a sense that not every successful challenge should be viewed as a 'defeat' for the Government. As we have seen, however, in examining the Government's approach to human rights litigation, this relaxed view would not extend to challenges to core functions of the Government.

Looking to the future, there is a clear expectation within the Government's legal services that human rights issues will cease to be treated as a separate matter and will instead become part of a 'hybrid' jurisprudence taken alongside other legal considerations. The CPS has already disbanded its ECHR group because it did not want Convention issues to be pigeonholed as a separate issue from other legal matters handled by its lawyers. Unless there is a major shift in the attitude of the courts to Convention issues, the courtroom will figure less prominently in the human rights work of Government lawyers as laws predating the HRA come to be first tested and then validated or changed. Prevention is gradually replacing cure as the major activity for Government lawyers—most referrals to the Attorney General concerning human rights issues are already in relation to the making of Section 19 statements for new legislation. From 1 January 2002, the Government also agreed to be more forthcoming about the reasons why new legislation is considered compatible with the Convention. This will facilitate a broader and more rational examination of human rights considerations than can be expected through the determination of individual cases by the courts.

4. A Scottish perspective

4.1 Introduction

Scotland's experience in implementing human rights legislation, important in its own right, also offers a useful counterpoint to the manner in which matters have been handled in Whitehall. In structure and attitude, there are both marked similarities and differences to be found in the approaches of London and Edinburgh towards the HRA and ECHR. This chapter examines:

- the Scottish Executive's human rights machinery and policy,
- the debate leading to the important decision to establish a Scottish Human Rights Commission, and
- the relationship between the Scotland Act and Human Rights Act.

It concludes with an analysis and comparison of the approaches being taken in Edinburgh and London to human rights matters.

4.2 Human rights machinery and policy

Scotland is bound by the ECHR through both the HRA and the Scotland Act. During the preparation phase, Scotland had its own ECHR Working Group set up within the Justice Department of the Scottish Executive to dispense advice and prepare guidance on the human rights implications of the Scotland Act and Human Rights Act. It had to prepare within a shorter timeframe than London because the Scotland Act came into force on 1 July 1999 and the Law Officers of the Scottish Executive became subject to the Convention on first joining the Executive on 20 May 1999.

The Justice Department remains the lead and co-ordinating department for human rights matters in Scotland. The role of its small human rights section is very similar to that of its counterpart, the Human Rights Unit, in Whitehall. Scotland has also chosen to mainstream human rights requirements with a small central operation to guide but not direct the efforts of other departments (ie. the Justice Department is not a 'Ministry of Justice').

There is a greater apparent sense of commitment among Ministers and officials in Scotland for the introduction of a human rights culture than found in England and Wales. Hitherto, the means of delivery have been equally weak but the political commitment was evident in the debates leading to the decision to establish a Scottish Human Rights Commission (see section 4.3 below). Promotion of a human rights culture in Scotland will be one of the functions of the proposed new commission. The latter issue dominated the work of the Justice Department in 2001 to the virtual exclusion of other matters. In this period, the department fared more poorly than its Whitehall counterpart in addressing the human rights agenda. It did not maintain an active network of contacts within the Scottish Executive and its HRA/ECHR guidance (as available on the web) dated and is now 'out of print' in paper

form. Towards the end of 2001, however, new life was being breathed into the subject with the resurrection, in November, of the Scottish Executive Human Rights Co-ordination Group and discussion about the creation of a working group to provide a forum for public authorities to discuss human rights matters and the need to update guidance materials. The department has also now decided to adopt its own version of the 'hot cases' list used in Whitehall in order to maintain a central record of key cases which should also help to improve communication with other departments within the Executive.

The Scottish Executive is only slowly breaking out of its single department mould—one beneficial legacy of this is the relative ease with which ECHR issues can be handled on a cross-cutting basis in a manner that would not be attempted in Whitehall. The Scottish Executive completed two reviews to flag up Convention issues using a similar 'traffic light' approach to the Home Office. The validity of the first review was questioned internally during the fallout from the *Starrs and Chalmers*[64] case and caused the Executive to take a second step not seen in Whitehall of commissioning a lawyer from outside Government to assist in auditing and proposing solutions for some of the more thorny issues. Unlike London, the Executive was prepared, as a result of this exercise, to enact omnibus ECHR legislation to correct any deficiencies in the law. The Bail, Judicial Appointments Act 2000 brought the procedures for granting bail into line with Article 5(3) of the Convention; revised the terms of appointment for sheriffs appointed on a temporary basis so as to comply with Article 6; and removed powers of local authorities to prosecute cases in the district courts again because of concerns arising under Article 6 of the ECHR. In June 2001, the Convention Rights (Compliance) (Scotland) Act 2001 tackled a broad range of potential breaches of the ECHR in a consolidated manner that would not be attempted in Whitehall. The Act:

- corrected possible ECHR deficiencies in the legal aid system;
- changed the system determining the release of adult mandatory life prisoners;
- created statutory tenure for Parole Board members; and
- repealed discriminatory provisions on homosexual offences.

The Act also gave the Scottish Executive a potentially more far reaching power than that available to the UK Government to make remedial orders where there are 'compelling reasons', for example, to act where there has been a successful challenge to similar legislation south of the border or at Strasbourg.

The openness with which the Scottish Executive addresses Convention issues through legislation differs from Whitehall practice which tends not to draw attention to human rights

[64] *Starrs and Chalmers v Ruxton*, 1999 GWD 37-1793, 2000 S.L.T. 379. On 11 November 1999, the High Court of Justiciary upheld a challenge under Article 6 of the Convention which ended the system of temporary sheriffs in Scotland. Temporary sheriffs were held not to constitute an independent and impartial tribunal having regard to their lack of security of tenure and the manner of their appointment and re-appointment by the Lord Advocate (who was also head of the prosecution service).

matters. However, Scotland's willingness to be seen to act in a proactive manner does not mean that it will sweep up every abuse identified by the courts or suspected to exist by those outside the Executive. The Compliance Act did not address, for example, the issue of 'slopping out' as regards which practice a case is pending before the Court of Session alleging a breach of Article 3 of the Convention. Nevertheless, having introduced the two omnibus pieces of legislation, the Scottish Executive would appear to consider that it has removed the last clearcut breaches of the Convention in Scottish law.

Scotland does not have or require the same extensive networking arrangements for Government lawyers as found in Whitehall. Prosecutions are handled centrally by the Crown Office (rather than through regional offices). Civil matters are co-ordinated through a litigators' group established in 2000 and chaired by the Solicitor General. The group functions as a reviewing body and meets every two months with representatives from the Legal Secretariat to the Lord Advocate, the Office of the Solicitor to the Scottish Executive, the Office of the Solicitor to the Advocate General, the Crown Office, the Welsh and Northern Ireland Assemblies and the LCD. In fact, comparatively few civil issues involving Convention points find their way to the Scottish courts. Criminal cases predominate, in part, because this focus has been established by the manner in which the actions of the Lord Advocate were first caught by the Scotland Act, but also because of the absence of specialist chambers north of the border handling civil matters.

The Scottish Executive has not prepared 'lines to take' for Government lawyers in the same manner as Whitehall. However, its lawyers are generally thought to be well prepared prompting not entirely 'tongue in the cheek' complaints from the private bar that there is an 'inequality of arms' in handling Convention points, and that its members should also have access to the training materials developed by the Crown Office.

Effective communication between London and Edinburgh on human rights matters is maintained through the litigators' groups and lawyers' networks north and south of the border. Minutes of the Whitehall fast tracking group are distributed to lawyers in the Scottish Executive. A representative from the Crown Office attends the ECHR Criminal Issues Co-ordinating group in London. Whitehall lawyers have briefed Scotland on such matters as *Alconbury*, *Wilson and First County Trust*, the Children's Act, and the Remedial Order amending the Mental Health Act 1983. In turn, Scottish lawyers have briefed Whitehall on the challenge before the Privy Council to the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, the implications of the *Brown* and *McIntosh* cases (see below), and problems in Scotland with the system of children's hearings and the granting of legal aid.

Scottish cases have tended to disappear off the Whitehall radar screen since 2 October 2000. In the period before the HRA came into force, acceptance of the ruling in *Starrs and Chalmers* had prompted a major review by the LCD of the arrangements for making appointments and re-appointments to tribunals in England and Wales. The legacy of a number of cases in

Scotland where delays had been found in bringing prosecutions in breach of Article 6 of the Convention was also felt in the English courts until effectively settled by the Attorney General's Reference No. 2 of 2001 (see section 3.7 above). But the early rash of successful challenges in Scotland has not been sustained. The Crown Office is now confident that the institutional causes of 'delay' have been eliminated and that such cases will only succeed in future because of individual error not a flaw in the system. Scotland has ceased to be the guinea pig for the HRA and for civil matters, in particular, it has become a quiet backwater when compared to the burgeoning case law in England and Wales.

Rulings of the Judicial Committee of the Privy Council on devolution issues are the major exception to this because of the precedence given to its decisions over other courts including the Appellate Committee of the House of Lords.[65] Thus while the English Court of Appeal had considered the compatibility under the Convention of the procedure for property confiscation orders in drug trafficking cases[66], the effective decision on this matter was taken in relation to the Scottish case of *McIntosh v H M Advocate*[67]—judgement handed down by the Judicial Committee of the Privy Council in February 2001. Another important ruling of the Judicial Committee dealt with the crucial issue of the right to silence and right against self-incrimination implicit in Article 6 of the Convention. The High Court of Justiciary in the case of *Brown v Stott* held that these rights had been breached by the use of evidence obtained under Section 172(3) of the Road Traffic Act 1988, under which it is an offence for the owner of a vehicle to fail to give information to the police when required to do so as to the identity of the driver at the time of the offence. This had implications for the functioning of road traffic legislation throughout the UK. However, the Judicial Committee held that an admission obtained under Section 172 did not breach Article 6 and could be relied on at trial, since the right against self-incrimination was not an absolute right and had to be balanced against the clear public interest in the enforcement of the road traffic legislation in order to address the high incidence of death and injuries on the roads caused by the misuse of vehicles.[68] The Judicial Committee's decisions in *McIntosh* and *Brown* came as a relief to lawyers within the Scottish Executive. They also believe that the Privy Council's willingness to put a high premium on the 'public interest' in drawing the balance with individual rights has somewhat dampened enthusiasm for the use of the ECHR in the Scottish courts. Less cheering for lawyers in the Crown Office, however, was the Privy Council's decision in the

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[65] See Andrew Le Sueur & Richard Cornes—'The Future of the United Kingdom's Top Courts'. Constitution Unit. 2001. Para 2.4.

[66] *R v Karl Benjafield*, December 21, 2000, CA.

[67] *McIntosh v H M Advocate* [2001] UKPC D1.

[68] *Margaret Anderson Brown v (1) Procurator Fiscal (Dunfermline) (2) Advocate General for Scotland*. 5 December 2000. Privy Council. [2001] 2 All ER 97.

case of *Millar*[69] which extended the repercussions of the *Starrs* case to other cases heard before temporary sheriffs in the period 20 May to 11 November 1999. Media reports at the time estimated that some 9,000 cases could be involved[70]. By the end of September the Crown Office had only identified around 100 successful cases.

The Judicial Committee of the Privy Council also hears challenges to legislation enacted by the Scottish Parliament. The first such Act of the Scottish Parliament, the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 was challenged as being contrary to Article 5 of the ECHR. On 15 October 2001, the Judicial Committee ruled that Section 1 of the Act was not incompatible with Article 5(1)(e) as it was not a requirement of the Convention that the continued detention of restricted patients in hospital for reasons of public safety be dependent on their condition being capable of treatment.[71]

4.3 A Scottish Human Rights Commission

On International Human Rights Day (10 December), the Deputy First Minister (Jim Wallace) disclosed one of the more significant outcomes of the Labour—Liberal Democrat partnership in Scotland by announcing that the Scottish Executive had taken the decision in principle to establish a Human Rights Commission for Scotland.

The proposal enjoyed all party support and a relatively quick gestation. A debate initiated by the Scottish Conservative Party in the Scottish Parliament in March 2000 had revealed that no Scottish party opposed and most positively favoured the establishment of a Scottish Human Rights Commission.[72] Speaking in the debate, the Deputy First Minister had not ruled out the establishment of such body and indicated that the Executive was waiting on proposals from the Scottish Human Rights Forum.[73] On receipt of these proposals in June 2000, he announced that the Executive would issue a public consultation paper in the Autumn on the proposition. In the same month, a new cross party group in the Scottish Parliament was launched to promote the case for a Scottish Human Rights Commission.[74]

Issue of the consultation paper was deferred from the Autumn and finally released on 30 March 2001. The proposals drawn up by the Scottish Human Rights Forum had argued for a fully-fledged commission based on the UN's 1991 'Paris Principles' for national human

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[69] *(1) David Cameron Millar v Procurator Fiscal, Elgin and (2) Kerry Payne, (3) Paul Stewart and (4) Joseph Tracey v Procurator Fiscal, Dundee*. 26 July 2001. Privy Council. [2001] UKPC D4.

[70] 'Thousands of convictions made unsafe'. *The Herald*. 26 July 2001.

[71] *(1) Karl Anderson (2) Alexander Reid and (3) Brian Doherty v (1) The Scottish Ministers (2) The Advocate General for Scotland*. 15 October 2001. Privy Council. [2001] UKPC D5.

[72] Scottish Parliament. Motion SIM-610 'European Convention on Human Rights'.

[73] Ibid. Col 313. Deputy First Minister.

[74] *The Herald*, 30 June 2000.

rights institutions.[75] They had been much encouraged by the presence at the forum of observers from the Justice Department of the Scottish Executive who they believed had 'green lighted' their submission in its final form. [76]The consultation document issued in March, however, was a different beast reflecting Cabinet instructions that the treatment should be 'balanced and neutral' thereby demonstrating the 'open mind' of the Executive on the issue. It sought views on four main areas:

> "Is a new body needed?
>
> Should this body be specifically Scottish?
>
> Possible role and status of a new body
>
> Relationship with other existing bodies."[77]

The possible roles outlined for such a body included:

> "To scrutinise for ECHR compliance proposals for legislation in the Scottish Parliament and perhaps UK legislation, which might impact on human rights in Scotland, and to advise the Executive and/or Parliament
>
> To monitor implementation of legislation and compliance by public authorities
>
> To provide guidance to public authorities on how to ensure compliance and effective protection of human rights
>
> To promote awareness of human rights issues, rights and responsibilities throughout Scotland
>
> To investigate and report on possible cases of abuse
>
> To assist individuals to take legal action in cases where rights may have been breached."[78]

These possible roles fully reflected the guidance provided in the 'Paris Principles'.

By the time the consultation period ended on 30 June 2001, 70 submissions had been received with three-quarters favouring some form of Human Rights Commission (with all of those in favour thinking it should be a statutory body specific to Scotland). There was broad agreement that such a body should be involved in the promotion of human rights and the provision of guidance as well as conducting pre-legislative scrutiny (reporting to the Scottish Parliament). There were divided views over whether such a Commission should be able to

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[75] UN General Assembly Resolution 48/134 (1991).

[76] The Justice Department has a different recollection—its officials participated in the forum to provide guidance on the range of issues that should be covered but this was not to imply approval for the specific proposals that were presented.

[77] Scottish Executive press release. SE0864/2001. 30 March 2001.

[78] 'Protecting Our Rights: A Human Rights Commission for Scotland?' Para 16.

undertake investigations into allegations of human rights abuses (either situations or individual cases) and to be able to take action if such abuses were identified.[79]

The Executive was uneasy about the small number of public authorities who had responded during the consultation exercise given the very substantial impact that a Human Rights Commission might have on the way in which they conducted their business. A separate exercise, targeted at public bodies, was commissioned by the central research unit of the Executive to obtain their views. Responses bore out the need for advice and guidance to be made available to public authorities in Scotland.

A Cabinet decision was taken at the end of 2001. Political support for the principle of establishing a Human Rights Commission remained strong but it was maintained that the practicalities of developing a working model would prevent action to set up a statutory body being taken before the 2003 elections to the Scottish Parliament. When interviews were being conducted in Scotland for this project, in September 2001, no work was in hand within the Justice Department or Office of the Solicitor to the Scottish Executive to examine different statutory models for such a Commission. No slot had been reserved for legislation and NGOs were being quietly advised that 2004 was the earliest practical date for the formation of such a body.

The Scottish Human Rights Commission will be an independent statutory body that will be involved with:

- "Promotion, education and awareness raising;
- Guidance to public authorities;
- Providing a source of advice, as required, to the Scottish Parliament on legislation after introduction;
- General monitoring and reporting in relation to public policy; and
- Investigation and reporting on generic or sectoral human rights issues in relation to public policy."[80]

Missing from its proposed remit is any power to handle individual cases or to bring such cases before the courts. This is a function of the Northern Ireland Human Rights Commission where it has been exercised in a small number of contentious cases. This is a path that the Scottish Executive clearly does not wish to tread which has provoked some criticism from the SNP that "the executive's version of the Human Rights Commission … has had its teeth drawn before it has had a chance to roar".[81] The Commission will, however, have the ability to investigate and report on 'human rights situations'. Details of the composition of the

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[79] The consultation paper and responses are available at [www.scotland.gov.uk/justice/humanrights].

[80] Speech by the Deputy First Minister at the launch of the Inverclyde Education Authority's Human Rights Charter for Schools. December10, 2001.

[81] *The Scotsman*. December 12, 2001.

Commission and whether interim arrangements might be introduced prior to the creation of the statutory body have still to be worked out. Detailed proposals will be the subject of consultation in 2002.

4.4 Relationship between the Scotland Act and Human Rights Act

Scotland is bound by the Convention in two ways. First through:

- Section 29 of the Scotland Act which provides that an Act of the Scottish Parliament may not include provisions that are incompatible with Convention rights as defined in the HRA; and
- Section 57(2) which provides that a member of the Scottish Executive has no power to make any subordinate legislation or do any other act which would be incompatible with Convention rights.

Second, after 2 October 2000, Scotland is bound by the HRA in the same manner as the rest of the UK.

The Human Rights Act and the three devolution statutes of 1998 were the responsibility of and were instructed by different Government departments. This clouded and has caused confusion over the manner in which these constitutional measures should interact. When the Human Rights Act came into force in Scotland uncertainty arose over its relationship with the Scotland Act when proceedings were brought against Scottish Ministers and the Lord Advocate. It appeared that a choice was available, allowing practitioners to raise Convention points against Scottish Ministers or the Lord Advocate under either the Human Rights Act or the Scotland Act. If the former was used, this would not constitute a devolution issue and therefore invoke the procedural and notification provisions in Schedule 6 of the Scotland Act. This meant that (as in the rest of the UK) human rights issues could be raised and dealt with during the trial itself (a particular attraction during criminal proceedings), whereas treatment as a devolution issue required that prior notice of a Convention point be given to the Advocate General for Scotland and (very often) that the issue be dealt with as a preliminary issue before the trial.[82] As a result, the number of human rights issues raised as devolution issues in criminal proceedings dropped dramatically after 2 October 2000.

An analysis of the position by Aiden O'Neill identified a number of differences between the two instruments. The Human Rights Act had:

- a one year time limit within which to bring court proceedings,
- no provision for filtering out frivolous or vexatious arguments,
- no provision for any variation by the court of the retrospective effect of the court's decision on incompatibility,
- no possibility for a fast track reference on the issue raised to higher courts, and

[82] Rules 40.2 and 40.3 of the Act of Adjournal (Devolution Issues) 1999 (SI 1999/346).

— a final appeal to the House of Lords or, for criminal proceedings in Scotland, the High Court of Justiciary acting as the final court of criminal appeal.

A devolution issue under the Scotland Act:

— was not subject to a specific time limit,
— notice had to be given to the relevant Law officers,
— allowed the courts to consider whether and to what extent any decision on incompatibility should be made retrospective, and
— provided for a final decision by the Judicial Committee of the Privy Council.83

It is also relevant to recall that provision made in the devolution statutes asserting the binding nature of rulings of the Judicial Committee of the Privy Council had altered the general rule that the Appellate Committee of the House of Lords was not bound by Privy Council decisions. This meant that " on questions of the effect and scope of Convention rights (which have been duly raised under the Devolution Statutes) the House of Lords has been superseded as the final court of appeal in the United Kingdom".[84]

Some lawyers within the Scottish Executive were uneasy that human rights matters could now be raised under the HRA without notification even where the issue at stake might relate to the powers of the Lord Advocate (although this was no different than the situation in England and Wales). Iain Jamieson, a former senior lawyer in the Executive, argued in an article published in the Scots Law Times shortly after his retirement that it was wrong to assume the existence of two different procedures. He considered that not treating human rights matters as devolution issues in Scotland raised three concerns for the constitutional settlement in the Scotland Act.

First: "failure to treat such issues as devolution issues would mean that they are not treated as giving rise to issues of competence whether of the Parliament or of the Scottish Executive and that is fundamental to their whole constitutional position."

Second: These "issues would not be intimated to the Law Officers of the UK Government and the Scottish Executive. This would not only be a breach of the statutory requirement in para 5 of Sched 6 and the rules of court but it would deprive the Advocate General and the Lord Advocate of their constitutional right to be involved in the determination of these issues."

Third: "failure to treat these questions as devolution issues would mean that these issues could not be referred or appealed, in both civil and criminal proceedings to the Judicial Committee of the Privy Council and this would undermine the clear intention of Parliament

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[83] See Aiden O'Neill 'The New Constitutional Matrix' in the Hon Lord Reed (ed) 'A Practical Guide to Human Rights Law in Scotland'. [2001] Sweet & Maxwell pp 54-56.

[84] Ibid pp 38.

that the Judicial Committee should be the final court on such questions so as to obtain a consistent and coherent view upon them throughout the UK".[85]

Other lawyers within the Executive commented during interviews for this project, that that there was more than a whiff of administrative convenience in the desire that all human rights matters should be the subject of prior notification which had proved to be a comfortable arrangement in the period before the HRA came into force. In the Crown Office, in particular, it was not thought that the legislative intent had been that it should be procedurally more difficult to process human rights cases in Scotland than England and Wales by insisting on a prior notification requirement. It was a matter of more real concern for the Advocate General for Scotland, the UK Government's Law Officer in Scotland, who was effectively shut out of matters if cases could be brought purely under the HRA. The Lord Advocate and Crown Office in prosecuting cases had no particular motivation to argue that the HRA challenges should be brought as devolution issues, since they were already involved in the process and lost nothing if the devolution issue path was not followed.

The Advocate General sought to clarify the issue in the *Mills* case before the High Court of Justiciary[86]. The Advocate General argued that the coming into force of the Human Rights Act did not create a new route for the raising of human rights issues which could avoid the necessity of notification to the Advocate General. This was necessary so that her office could ensure that the constitutional settlement established through the terms of the Scotland Act would be observed.[87]

The court noted two contrary arguments:

- the requirement of the HRA, particularly Section 7, that there was a right to challenge an unlawful act "directly" irrespective of any procedure that might be laid down under domestic law; and
- the implication that the Advocate General's argument would have in establishing a right of appeal to the Privy Council for a wide range of issues in the criminal law in Scotland which had hitherto been dealt with by the High Court as the final court of appeal.88

Nevertheless, the court took the view that "a challenge to the court proceedings in any form implies a challenge to the powers of the Lord Advocate at least up to the stage of conviction. If so, we can see no reason to hold that the coming into force of the Human Rights Act has altered that situation and, therefore, no reason to treat the coming into force of the Act as

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[85] Iain Jamieson 'Relationship between the Scotland Act and the Human Rights Act', Scots Law Times [2001] 5, p43-48 at 47.

[86] *(1) Kenneth Mills (2) John Cochrane v HM Advocate & HM Advocate for Scotland.* Appeal Court, High Court of Justiciary. 5 October 2001.

[87] Ibid. Para 16 of the judgement.

[88] Ibid. Para 17.

having modified the requirement to intimate to the Advocate General."[89] The court did not expect this to be the final word. It noted—"Given that issues can arise at any stage of the prosecution we would not be surprised to see arguments designed to limit the scope of the issues which must be classed as devolution issues being presented in future cases."[90] And this is not to mean that the Human Rights Act now ceases to have any practical effect in Scotland.

It would still be possible, for example, to bring a challenge that the Lord Advocate had failed to bring a prosecution within the reasonable period prescribed by Article 6 of the Convention under Section 7(1) of the HRA as well as Section 57(2) of the Scotland Act provided that the notification requirement under the Scotland Act was met. The court's decision also does not address and leaves open the question of what would happen if defence practitioners were to frame their challenges not against the actions of the Lord Advocate but in terms of the court's 'participation' or 'involvement' in the alleged abuse, since the obligation on a court (as a public body) to act in a manner compatible with Convention rights is not a devolution issue for the purposes of the Scotland Act.

4.5 Conclusion

Scotland has not experienced the same structural upheavals as Whitehall concerning the manner in which human rights matters are handled within government. It has also not experienced the 'backlash' concerning the protection of individual human rights seen in Westminster and Whitehall in response to the events of 11 September. The political commitment of the coalition government in Scotland to the promotion of human rights remains strong. In a speech celebrating the first anniversary of the Human Rights Act, the Deputy First Minister spoke at length about the 'human rights culture' being developed in Scotland:

> "This is the message that we must give to Scots in every walk of life.
>
> — That human rights is about you and yours and not rights for criminals or rights for lawyers
>
> — That human rights is about respect for your neighbours but also about their responsibility to respect your rights
>
> — That human rights is about world issues, about the tragedy in America, about the status of refugees, about Kosovo, and about Scotland's place in Europe but it is also about Scottish issues and Scottish society.

[89] Ibid. Para 19.

[90] Ibid. Para 20.

> It is this message, and taking positive steps to reinforce it, which will help us to develop a culture of respect for human rights in Scotland."[91]

In 2001, the Scottish Executive did not have the means to implement such a culture. Its human rights arm had exactly the same problems as its counterpart in London of not being able to reach into every part of government, never mind wider society, to influence matters. However, in Scotland, there is the promise of things to come. The decision to establish a Scottish Human Rights Commission will ensure that there is a focal point for human rights matters in Scotland. A body that will be able to directly assist and encourage public bodies (resources permitting) to engage with human rights.

Scottish human rights cases have become less influential as the courts in England and Wales develop their own jurisprudence especially in relation to civil matters. The important exception exists in relation to Scottish cases brought before the Judicial Committee of the Privy Council, whose rulings have precedence over decisions of the Appellate Committee of the House of Lords. The existence of the 'double apex' remains a potential source of confusion for the final determination of human rights matters and means that what happens in Scotland has a continuing resonance for the rest of the UK. Both north and south of the border, the executive branches have reached the point where they believe that their statute books now broadly comply with the Convention. It has taken the Scottish Executive a little longer to reach this point and it has endured a rougher ride in the courts. But through its use of omnibus legislation it has also demonstrated a greater openness in correcting incompatible legislation than Whitehall.

The complexities of the interaction of the Scotland Act and the Human Rights Act will continue to pose problems for the Scottish Executive in ways that will never trouble Whitehall. However, from a UK perspective, it is difficult to enthuse over steps being taken in Scotland that may invoke additional procedural hurdles and restrict use of the Human Rights Act in ways not found in England and Wales.

If there is one final lesson, above others, to be gained from the experiences of Edinburgh and London it is the fact that structures, systems and procedures cannot substitute for a sense of purpose in ensuring respect for human rights.

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[91] Jim Wallace, Deputy First Minister—'The Human Rights Act—One Year On'. Speech to the Glasgow Graduate School of Law/McGrigor Donald Conference. University of Strathclyde. 1 October 2001.

5. Conclusions

Drawing conclusions a brief 15 months after the Human Rights Act came into force is a risky business with every possibility that what is said will be blown out of the water by the events of tomorrow or the next year or the year after that. There will be many opportunities for future corrections. The Human Rights Act is not a transient feature of the UK political scene; it has a long term and potentially permanent place in the 'unwritten' constitution of the UK.

The Act has warranted and received serious attention from the Government partly from a sense of conviction and partly from a sense of fear over what it might achieve. The Government took extraordinary steps to prepare for the introduction of the Human Rights Act and to limit its exposure to the potential use of the ECHR in the domestic courts. The effectiveness of these steps has been largely born out by the first year's experience in the operation of the Act. The risk management and audit exercises undertaken before the Act came into force correctly identified most, if not all, of the Convention issues likely to be raised in the courts. In preparing arguments on these matters, the Government has accurately sensed the mood and disposition of the judges towards the use of the HRA and ECHR. It has established a 'winning record'. Fifteen months ago, we wondered at the disparity between the expectations of lawyers inside and outside Government over the anticipated impact of the HRA. The experience of the first year would suggest that the Government had the more accurate grasp of what would actually transpire.

A valid counter argument may be made, however, that the HRA is on a 'slow burn' and that it will bite more deeply as judges (and non-Government lawyers) become increasingly familiar and confident in handling the intricacies of the Convention. The Government might be said to have had a scripted 'game plan' that carried it through the first year but will this hold up in 'open play' in the years ahead?

The seriousness with which the Government has addressed Convention issues is commendable. Its legal systems have demonstrated an unerring ability to pick up, analyse and respond to issues as they arise in the courts. The contention is made in this report, and disputed by Government lawyers involved with its litigation groups, that the legal machinery is set up to appeal cases and does not offer a readily available avenue for lawyers or officials to accept rulings of lower courts on Convention matters. It may be that the first year has not seen the right sort of case or ruling but whether by design or chance the Government has established a track record of bringing and winning cases on appeal. So much so, that it has had to search hard for cases where it may demonstrate the positive benefits of the HRA and ECHR in either defending individual human rights or achieving changes to better secure those rights.

The Government's mainstreaming strategy has yet to succeed in establishing its proposed "human rights culture" in developing a sense of respect for human rights within its departments, public authorities and society as a whole.

The Government's "human rights culture" is focused on compliance with the requirements of the ECHR. There is no meeting of minds on the argument advanced in this report that the culture should embrace the broader spectrum of human rights obligations accepted by the UK. The constitutional status accorded to Convention rights through the Human Rights Act suggests that these other rights simply do not carry the same legitimacy in the eyes of the Government. The Government is not wrong to pursue a 'Convention culture' but this does not absolve it from the need to pay heed to other human rights. And it should correct the impression, now endemic throughout public bodies, that compliance with the Convention is the same as being 'human rights compliant'.

There are no short cuts to establishing any form of "human rights culture". Within the public sector, the Government is faced with the problem of trying to build a culture out of litigation or the fear of litigation. This is not a culture to be embraced enthusiastically by Government departments. There can be no warming to human rights in such a context—they will all too readily be seen as an obstacle or threat to the policy objectives of an organisation.

A more positive take—the equation of human rights with good practice—is not something that will emerge overnight. A start has been made through the Section 19 procedure under the HRA but it remains an open question how deeply human rights are embedded in the thought processes of policy and law-makers. As litigation becomes a less prominent feature of the HRA, as it should in the longer term, there is a greater likelihood that human rights considerations will be viewed in a more positive light within Government.

There are well-rehearsed arguments in this report for and against a central authority to steer implementation of the Human Rights Act and to secure the "human rights culture". From a Government perspective, the extent to which matters have been led from the centre is already exceptional. The federal structure in Whitehall does not grant any one Minister or department authority over others and even if they had such authority it would be impractical for them to have the means and knowledge to direct the human rights efforts of other organisations. The notion of an authoritative and controlling 'Ministry of Justice' is a non-starter in the eyes of Whitehall.

If this premise is accepted, what should happen if mainstreaming has not had the desired effect of cementing respect for human rights in each and every Government department and public authority? The tide within Government was ebbing fast against human rights at the end of 2001. It can only be guessed at how hard the LCD had to work simply to stand still and prevent erosion of the work already undertaken in the human rights field. However, preserving the status quo is unlikely to be recognised as much of an achievement by the demanding audiences outside Government.

If the momentum is to be recaptured, there is still a need for an active centre of knowledge which can act as champion and guardian to steer and monitor implementation of the HRA and ECHR. This cannot be done on an ad hoc basis. The Home Office was effective during the implementation phase because it was a major player in Whitehall and was also directly responsible for many of the policy areas susceptible to challenge under the Convention. The Lord Chancellor's Department does not carry the same weight in Whitehall. If it is to be an effective guardian of the Convention it will need to rely on procedural mechanisms. However, at present, the Human Rights Unit in the LCD lacks a clear mechanism to be consulted on departmental policies engaging Convention rights. The means are there, once the Section 19 procedure is engaged, for the Attorney General to ensure that new legislation will not breach the Convention no matter how pressing are the political priorities of a department. There is no similar mechanism at the initial stage of policy formulation. There are already requirements to consult on regulatory policy within Government. The same could be argued for with regards to the Convention/human rights consequences of policy initiatives.

The human rights debate in the next year is going to be dominated by the issue of whether or not there should be some form of UK Human Rights Commission. We cannot address all the issues involved here. However, would a Human Rights Commission, in the areas addressed by this report, 'add value' to the protection of human rights in the UK?

A properly resourced and effective commission could clearly contribute to the selling of a broadly based "human rights culture" within the UK. It could do so without having to stay within the constrictions of the Government's policy stance, and the Government's limited view of which human rights and human rights instruments should have legal effect within the UK. This would broaden the exchange of human rights ideas beyond the present narrow confines of the ECHR.

It is less likely that such a Commission would be able to work as effectively in securing the "human rights culture" within the public sector. Public bodies could be expected to appreciate advice and guidance on human rights matters but would be much more wary of a Commission invested with the power to monitor and investigate human rights matters. This is a potential role for a Human Rights Commission where it could complement the work of the ECHR and the courts. The Convention works best in addressing individual human rights complaints capable of being remedied in a court of law. The Convention machinery cannot address situations or a series of complaints especially where solutions may lie in matters of social policy. This is a function that can be performed by a Human Rights Commission with powers and functions akin to the existing 'equality' commissions. However, this broaches a major question, which cannot be answered here, of what might be the relationship between a new Human Rights Commission and the existing 'equality' commissions. It would be no simple matter for such a body to be simply grafted onto the existing network of

commissions. There is also a potential conflict in the investigative functions of a prospective UK Human Rights Commission and the Joint Parliamentary Committee on Human Rights.

A Human Rights Commission could also be given the ability to assist applicants or bring its own cases under the HRA and ECHR (as given to the Northern Ireland Human Rights Commission). The Scottish Executive, which has experienced similar problems to Whitehall in its handling of human rights issues, has decided to establish a Scottish Human Rights Commission. But it will not have the ability to bring individual cases before the courts. The experience of the first year of implementation of the HRA does not appear to reveal particular problems for individuals to be able to raise Convention points before the courts. In fact, it is almost always the case that this takes place within the context of existing court proceedings (criminal trial, judicial review etc) where legal representation and advice are available. There does not appear to be a strong requirement, therefore, for an additional body with powers to bring 'free standing' Convention issues before the courts. A Human Rights Commission might be better employed as a forum for 'alternative dispute resolution' on human rights complaints operating outside the judicial process.

Annex C

Cases recommended for fast tracking by the Government ECHR fast track group.[92]

1. *R v Havering Magistrates Court* (breaches of bail conditions)[2001] 3 All ER 997;
2. *R v Christopher St John* (HL) (extradition);
3. *R v Benjafield, R v Leal, R v Rezvi*, *R v Milford*, 21 December 2000, CA (confiscation in criminal proceedings);
4. *R v Muhammed* (incompatibility of offence);
5. *R v A*, 17 May 2001, HL (rape shield law)[2001] UKHL 25;
6. *R v Redbridge Justices ex parte DPP* (TV links for child witnesses) [2001] 2 Cr App R 25
7. *R v Lambert, Ali and Jordan*, 5 July 2001, HL (reverse burden of proof, retrospective effect of the HRA)[2001] UKHL 37;
8. *R v Thames JJs ex parte Sammons* (severance)
9. *R v Westlake* (use of cannabis for religious reasons)
10. *R on application of Nigel Smith v Lincoln Crown Court and R on application of Chief Constable of Lancashire v Preston Crown Court*, 12 November 2001, QBD,AC (impartiality of magistrates bench hearing licensing appeals)[2001] EWHC Admin 928;
11. *R v Manchester CC ex parte McCann*, 1 March 2001, CA (Anti Social Behaviour Orders)[2001] 1 WLR 1085;
12. *R v Kansal*, 29 November 2001, HL (retrospective effect of the HRA)[2001] UKHL 62;
13. *R v Seggers* (self incrimination)
14. *R v Wilson* (road traffic legislation) [2001] 98(18) LSG 45;
15. *R v Goldsmith and Lyons v HM Customs and Excise* (civil or criminal penalties)
16. *R(DPP) v Acton Youth Court*, 22 May 2001, QBD,DC (was a District Judge correct to disqualify himself from hearing a trial because he earlier ruled in favour of the prosecution's ex parte application for non disclosure of material on the ground it attracted Public Interest Immunity)[2001] EWHC Admin 402;
17. *Attorney General's Reference No. 2 of 2001*, R v J, 2 July 2001, CA (unreasonable delay in bringing to trial) [2001] EWCA Crim 1015;

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[92] Information supplied by the Legal Secretariat to the Law Officers.

18. *Wildman v CPS* (whether evidence is required for pre trial applications) [2001] EWHC Admin 14;
19. *Attorney General's Reference No. 7 of 2000*, 29 March 2001, CA (self-incrimination) [2001] EWCA Crim 888;
20. *Margaret Anderson Brown v (1) Procurator Fiscal (Dunfermline) (2) Advocate General for Scotland*, 5 December 2000, PC (self-incrimination in road traffic offences)[2001] 2 All ER 97.

Annex D

Human rights cases

Government lawyers involved with the two litigators groups were invited to nominate the most significant cases since the Human Rights Act came into force (to December 2001). A composite list (in no particular order of priority) is given below:

Civil

1. *Alconbury*[93](see Section 3.4 above).
2. *Wilson v First County Trust*[94]- the Court of Appeal found that the provisions of Section 127(3) of the Consumer Credit Act 1974 were incompatible with the rights guaranteed by Article 1 of Protocol 1 and Article 6(1) of the Convention because the absolute bar on enforcement of a regulated agreement was a disproportionate restriction on the rights of a lender. The significance of the case for the Government was that this was one of the first occasions where the court itself raised the possibility of there being a breach of the Convention, rather than either of the parties to the case. Although the action involved two private parties, the court's intervention indicated that the Human Rights Act could have horizontal effect in private relationships through the obligation on a court to interpret legislation in a manner compatible with the ECHR. The court's decision to make a declaration of incompatibility brought little comfort to either party in the case because it had no effect on their dispute. Both parties had argued that the legislation could be 'read down' by the court in giving judgement.
3. *Peter Marcic v Thames Water Utilities Ltd* [95]- The Technology and Construction Court found that the failure of Thames Water Utilities Ltd to carry out works to prevent repeated flooding of Mr Marcic's property was a violation of his right to respect for his private and family life under Article 8 of the ECHR. As Thames Water did not intend to carry out the works to remedy the problem, the court ruled that Mr Marcic was entitled to damages (just satisfaction). This was the first and only occasion (to the end of 2001) that an award of damages had been made under the Human Rights Act.
4. *Wallbank and Wallbank v Aston Cantlow and Wilmcote PCC* [96]- Mr and Mrs Wallbank owned a farm that, for historical reasons, rendered them liable for the upkeep of the chancel of

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[93] R v Secretary of State for the Environment ex parte Holding and Barnes PLC and others, 9 May 2001, HL.

[94] Wilson v First County Trust, 2 May 2001, CA.

[95] Peter Marcic v Thames Water Utilities Ltd, 14 May 2001, High Court.

[96] Parochial Church Council of Aston Cantlow & Wilmcote with Billesley, Warwickshire v (1) Gail R Wallbank (2) Andrew David Wallbank, 17 May 2001, CA.

the local parish church. The Parochial Church Council tried to recover £95,000 from the Wallbanks for the cost of repairs. The Court of Appeal found that the liability for chancel repairs was a tax that operates arbitrarily and violated the Wallbanks' right to the peaceful enjoyment of their property (Article 1 of the First Protocol). It was also found to be unlawful discrimination in breach of Article 14. The case was an indicator of how broadly the definition of public bodies subject to the HRA could be drawn.

5. *R v Crawley Green Road Cemetery, Luton*—The ashes of the petitioner's husband had been interred in a consecrated plot in error following a humanist funeral but she was denied permission to move them. The court held that the freedom of thought, conscience and religion, guaranteed by Article 9, meant the petitioner should be allowed to remove her husband's ashes from a place where their burial was contrary to her humanist beliefs.

6. *R (McCann) v Manchester Crown Court and Chief Constable of Manchester* [97]- the Court of Appeal upheld the decision of the Administrative Court that the making of anti social behaviour orders was a civil procedure and a hearing of the order's breach was a criminal proceeding. There had been considerable debate before the HRA came into force as to whether the imposition of anti social behaviour orders would breach Article 6 of the Convention by failing to provide the full panoply of criminal guarantees in proceedings which arguably lead to a criminal sanction. Anti social orders had been criticised as 'cross breed' orders because they allowed civil courts to identify behaviour on a civil burden of proof that might later lead to criminal penalties being imposed. The Court of Appeal considered that anti social behaviour orders were not about crime and punishment but rather that they were intended to protect identified sections of the community.

Criminal

7. *R v Pyrah, R v Lichniak*[98]—Following their separate convictions for murder, mandatory sentences of life imprisonment were imposed on Lichniak and Pyrah as required by Section 1 of the Murder (Abolition of the Death Penalty) Act 1965. Both sought judicial review of the decision. However, Section 9(1) of the Criminal Appeal Act 1968 prevented an appeal against a sentence fixed by law and Section 29(3) of the Supreme Court Act 1981 provided that the Divisional Court had no jurisdiction in such matters. In a surprise to the Government, the Court of Appeal considered that it had jurisdiction to hear the case, as appeals against sentence, as they raised arguable matters as to the compatibility of Section 1 of the 1965 Act with the Convention. This was possible in the court's view because Section 3(1) of the Human Rights Act required it to read and give effect to

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[97] R v Manchester Crown Court and Chief Constable of Manchester ex parte (1) Sean McCann (2) Joseph McCann (3) Michael McCann (by their mother and litigant friend Margaret McCann), 1 March 2001, CA.

[98] R (on the application of Lichniak) v Secretary of State for the Home Department. CA, 2 May [2001] H.R.L.R. 43.

Section 9(1) of the 1968 Act in a way which was compatible with Convention rights. The court went on to dismiss the appeals on merits finding that a mandatory life sentence of imprisonment was not incompatible with Articles 3 and 5 of the Convention. An appeal will go to the House of Lords. Of interest to the Government, is whether the case will benchmark the extent to which the courts should respect and defer to the sovereignty of Parliament.

8. *Attorney General's Reference No. 7 of 2000* [99]– the Attorney General sought clarification whether the duty owed by a bankrupt under Section 291 of the Insolvency Act to provide documents to the Official Receiver gave rise to a breach of Article 6 of the ECHR if such documents were used by the Crown to prosecute bankruptcy offences. Was this a breach of the right against self-incrimination? In the case in question, the trial judge had ruled that the documents were inadmissible and directed that a verdict of not guilty be entered. The Attorney General referred the following point to the Court of Appeal—did the prosecution of a bankrupt using documents which were delivered up to the Official Receiver under compulsion (but which do not contain statements made by the bankrupt under compulsion) violate the bankrupt's rights under Article 6 of the Convention. The court, having considered the jurisprudence of the ECtHR, which it did not find wholly consistent, concluded: "In our judgement, the answer to the question posed by the Attorney general is 'No'. We say that for a number of reasons. First, there is no doubt and indeed it is not disputed before this court that the privilege against self-incrimination is not absolute and, in English law, Parliament has, for a variety of reasons, in a whole range of different statutory contexts, made inroads upon that privilege."

9. *Attorney General Reference No 2 of 2001*—a Crown Court judge had stayed indictments against seven defendants on the grounds that there had been an unreasonable delay in bringing the case to trial in breach of Article 6(1) of the Convention. The Attorney General sought the opinion of the Court of Appeal on two questions:

   "(1) Whether criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in Article 6(1) of the [ECHR] in circumstances where the accused cannot demonstrate any prejudice arising from the delay.

   (2) In the determination of whether, for the purposes of Article 6(1) of the Convention, a criminal charge has been heard within a reasonable time, when does the relevant time period commence?"

   The court considered that criminal proceedings should only be stayed where there had been an unreasonable delay that had prejudiced the defence. However, the 'delay' should be calculated not just from the time of being charged but from any point in the investigation where something had occurred to the detriment of the defendant.

10. R v A (the rape shield law) [100]- the House of Lords ruled that preventing a defendant charged with a sexual offence from introducing evidence of a prior consensual sexual relationship with the complainant could infringe the right to a fair trial under Article 6 of the Convention. The aspect that caused particular concern within Government was the Lords' use of their interpretative obligations under Section 3 of the Human Rights Act to 'read down' the existing prohibition on such evidence or questioning in Section 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999, in order to enable a trial judge to allow its admissibility where exclusion would endanger the fairness of the trial in breach of Article 6 of the ECHR.

11. Margaret Anderson Brown v (1) Procurator Fiscal (Dunfermline) (2) Advocate General for Scotland [101]- the Privy Council ruled that the admission in criminal proceedings of a suspect's identification that they were the registered keeper of a vehicle under Section 172 of the Road Traffic Act 1988 did not violate Article 6 of the Convention. The Privy Council considered that Section 172 was not a disproportionate response to the problem faced by the community of death or injury caused by the misuse of motor vehicles.

12. R v Lambert [102] R vKansal [103]- these two cases, ruled on by the House of Lords, considered the crucial question for the Government of whether the Human Rights Act had retrospective effect over events before the Act came into force. In the course of 2001, concern arose within the Government that proceedings involving the Criminal Case Review Commission could lead to the HRA being applied to proceedings completed many years before the Act came into force (the 'Guy Fawkes' argument). However, in *Lambert*, five law lords, Lord Steyn dissenting in part, ruled that the presumption of innocence in Article 6(2) of the Convention, as scheduled to the Human Rights Act, did not apply retrospectively to a summing up made before the Act came into force. The Act was deemed retrospective for actions brought by or at the instigation of a public authority but was not retrospective in respect of appeals in those proceedings. This good news for the Government was tempered by the apparent unease among the law lords at this interpretation. In *Kansal*, five law lords (including four associated with the earlier decision) concluded that the decision in *Lambert* may have been mistaken but that as a bench of five they could not so quickly overturn or reinterpret the earlier decision (had they met as a bench of seven this decision might have been different). The question of

[99] R v Attorney General Reference No. 7 of 2000 CA, 29 March [2001] H.R.L.R. 41.

[100] R v A, 17 May 2001, HL.

[101] Margaret Anderson Brown v (1) Procurator Fiscal (Dunfermline (2) Advocate General for Scotland, 5 December 2000, PC.

[102] R v Lambert, 5 July 2001, HL.

[103] R v Kansal (No2), 29 November 2001, HL.

whether and in what circumstances the HRA would have retrospective effect is a matter that remains unresolved at this time.

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